Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CITY OF JACKSONVILLE,

Petitioner,

v.

LADY J. LINGERIE, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the court of appeals invalidated certain provisions of a city's zoning ordinance that required "adult entertainment" businesses to obtain a special exception prior to operating in ninety-three of the ninety-five available sites zoned for such uses. The questions presented are:

(1) Whether the constitutionality of a zoning ordinance that regulates the permissible locations of adult entertainment businesses by requiring them to obtain a special exception is governed by the "time, place and manner" analysis of *City of Renton v. Playtime Theatres, Inc.* or the two-pronged prior restraint analysis of *FW/PBS, Inc. v. City of Dallas*; and

(2) Whether the use of content-neutral zoning exception criteria to evaluate the compatibility of a proposed land use with existing uses in a particular area constitutes an unconstitutional prior restraint when applied to adult entertainment businesses.

PARTIES TO THE PROCEEDING

The Petitioner/Defendant is the consolidated City of Jacksonville, a municipal corporation located in Duval County, Florida.

The Respondents/Plaintiffs are various corporations and individuals who operate "adult entertainment" businesses featuring sexually explicit nude dancing for their patrons.

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Petitioner, the consolidated City of Jacksonville, a Florida municipal corporation, respectfully requests that this Honorable Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999), for two separate reasons:

(1) To reconcile the conflicting analyses employed by the lower courts in examining the constitutionality of zoning exception provisions which regulate the permissible locations of adult entertainment businesses; and

(2) To resolve an express conflict between the Eleventh and Second Circuits regarding the application of the prior restraint doctrine to content-neutral zoning exception criteria.

OPINIONS BELOW

The opinion of the district court is reported at 973 F. Supp. 1428 (M.D. Fla. 1997) and is reproduced at Appendix B to this Petition. (App. B at 35a). The decision of the court of appeals is reported at 176 F.3d 1358 (11th Cir. 1999) and is reproduced at Appendix A to this Petition. (App. A at 1a).

STATEMENT OF JURISDICTION

The Eleventh Circuit Court of Appeals entered its judgment on May 27, 1999. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

APPLICABLE CONSTITUTIONAL AND ORDINANCE CODE PROVISIONS

The First Amendment to the Constitution of the United States of America provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. CONST. Amend. I.

Two separate chapters of the City of Jacksonville Ordinance Code are at issue. The pertinent provisions of Chapter 150 (Adult Entertainment and Services Code), Parts 1 and 2, are reproduced at Appendix C to this Petition. (App. C at 89a). The pertinent provisions of Chapter 656 (Zoning Code), Parts 1, 3 and 11, are contained in the appendix to the opinion of the Eleventh Circuit. (App. A at 25a).

STATEMENT OF THE CASE

The questions presented for this Court's review reflect the latest example of the conflict among the federal courts regarding the extent to which local governments may use their zoning authority to regulate the design and character of their communities. Historically, this Court has accorded a strong presumption of validity to local zoning regulations that merely restrict the location of adult entertainment businesses. *See City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini-Theaters, Inc.*, 427 U.S. 50 (1976). Where, however, the government goes beyond simply regulating the location of these businesses and subjects them to a licensing scheme that conditions the expression of their constitutionally protected message of "eroticism" *anywhere* within the community, the licensing scheme will be subjected to a greater degree of scrutiny. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

What remains unclear is which analysis governs the situation where, as here, the *zoning* regulations that set forth

the permissible locations for such businesses also contain specific criteria for evaluating whether the proposed use is appropriate for a specific area. Such criteria include considerations regarding the compatibility of the proposed land use with the surrounding area — including its potential impact on such things as traffic, safety and infrastructure — as well as the consistency of the proposed land use with the local government's comprehensive plan for future development. The opinion below reflects the most recent example of the split among the lower courts as to whether these cases should be analyzed as involving: (1) simple zoning regulations designating appropriate locations for such uses; or (2) business licensing schemes requiring enhanced procedural safeguards to protect against unbridled discretion and indefinite delay in the decisionmaking process. The Petitioner respectfully submits that this confusion among the lower courts deserves guidance from this Honorable Court in balancing the competing interests at stake so as to ensure both predictability in the judiciary and sound public policy.

I. RELEVANT BACKGROUND FACTS

This litigation was first instituted by a group of businesses known as "lingerie shops" that operated in various locations within the City of Jacksonville (the "City"). As their names suggest,[1] the primary purpose of these "lingerie shops" was not to sell lingerie. Rather, these were "entertainment" establishments. This entertainment consisted of sexually explicit, nude dancing conducted in small private rooms by a female dancer before her male customer, who would be encouraged to expose his genitals and masturbate. (R6-116-32). Tissues and lotion were provided for the customer's use. (R6-116-32).

1. Initially, the plaintiffs included Lady J. Lingerie, Inc. and the owners/operators of various other lingerie shops, including Naughty Girls Lingerie, Showgirls Lingerie, Secret Pleasures, A Touch of Class and Private Moments Lingerie.

In addition to the lingerie shops, the owner of a nude dancing business known as J.R.'s Lounge filed a separate suit to enjoin the enforcement of the City's adult entertainment and zoning regulations, challenging various provisions of both ordinances as unconstitutional.[2] The cases were ultimately consolidated for trial.

A. The Adult Entertainment Licensing Scheme

Consistent with the holdings of this Court, the City's legislatively expressed interest in establishing regulations which provide for the licensing of adult entertainment businesses is "wholly unrelated to any suppression of free expression." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 80-81 (1976). The City's Adult Entertainment and Services Code sets forth a content-neutral regulatory scheme aimed at proscribing the adverse secondary effects associated with such businesses, including increased crime and neighborhood deterioration. (App. C at 90a).

Anyone wishing to operate an adult entertainment business in the City of Jacksonville must first obtain a license from the Sheriff.[3] (App. C. at 100a). The regulations set forth in the City's Code include all the procedural safeguards necessary to sustain the constitutionality of a business licensing scheme. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). Namely, the Sheriff has no discretion to deny a license if the application is complete and the licensed premises satisfy all applicable public health and safety regulations. (App. C at 101a-106a). In addition, the Sheriff

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2. The constitutionality of the City's adult entertainment ordinance, although relevant, is not at issue before this Court. The challenge here is directed solely to the application of the City's *zoning* ordinance to adult entertainment businesses.

3. In addition to regulating the types of adult entertainment businesses operated by the Respondents, the Code also regulates adult bookstores and adult motion picture theaters.

is required to notify the applicant of his decision to either approve or deny the application within forty-five days of its submission. (App. C at 107a). If the Sheriff denies the application, he must seek declaratory relief in a court of competent jurisdiction within ten days of his decision; moreover, the Sheriff bears the burden of proving that the denial of the license is justified under the terms of the ordinance. (App. C at 107a).

As part of the application process, the applicant must present the Sheriff with proof that the subject property is properly zoned for the requested use. (App. C at 105a). Adult entertainment businesses are allowed by right in a Commercial/Central Business District ("CCBD") zone and by exception in a Commercial Community/ General-2 zoning district ("CCG-2"). If the subject property is zoned CCG-2 and the applicant has submitted proof of applying for an exception with the City's Planning and Development Department, the Sheriff may not deny the license application. (App. C at 106a). Rather, the Sheriff must defer his decision until the requested zoning exception has either been granted or denied. (App. C at 106a). Notwithstanding the absence of a final decision from the Sheriff, an applicant who has properly filed for a zoning exception is entitled to begin operating an adult entertainment business forty-five days after applying for a license pursuant to the Adult Entertainment and Services Code. (App. C at 101a).

B. The Zoning Code Exception Criteria

Under the City's Zoning Code, adult entertainment businesses may be located on any one of ninety-five separate sites. (R6-116-16-17). Two of these sites are located in the CCBD zoning district; the remaining ninety-three sites are dispersed throughout the City in CCG-2 zoning districts. An adult entertainment business may locate in a CCBD zoning district as a matter of right. Those wishing to locate in a

CCG-2 zoning district, however, must first obtain a zoning exception.[4]

The zoning exception process is designed to ensure that the location of certain proposed land uses is both consistent with the City's comprehensive plan for future development and compatible with the surrounding area. The proposed use of land is presumptively permissible; however, fundamental planning principles recognize that some uses — although appropriate generally throughout the zoning district — may not be well-suited for a particular location.[5]

The Jacksonville Planning Commission — a nine-member body comprised of lawyers, planners, architects, realtors and other volunteers — presides over quasi-judicial public hearings on applications for zoning exceptions. The Commission's review of these applications is limited to a consideration of nine separate criteria:

(1) Whether the proposed use of the property will be consistent with the Comprehensive Plan, including any subsequent plan adopted by the Council pursuant thereto;

(2) Whether the proposed use of the property will be compatible with the existing contiguous uses or

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4. The requirement for a zoning exception is not limited to adult entertainment businesses; this is also a prerequisite for any one of eleven other uses of land in a CCG-2 zoning district. § 656.313(c), Jacksonville Ordinance Code.

5. The City's zoning code defines an exception as "a use that would not be appropriate generally or without restriction throughout the zoning district, but which, if controlled as to number, area, location or relation to the neighborhood, could promote the public health, safety, welfare, morals, order, comfort, convenience appearance, prosperity or general welfare." § 656.101(g), Jacksonville Ordinance Code.

zoning and compatible with the general character of the area, considering population density, design, scale and orientation of structures to the area, property values, and existing similar uses or zoning;

(3) Whether the proposed use of the property will have an environmental impact inconsistent with the health, safety and welfare of the community;

(4) Whether the proposed use of the property will have a detrimental effect on vehicular or pedestrian traffic, or parking conditions, and whether it will result in the generation or creation of traffic inconsistent with the health, safety and welfare of the community;

(5) Whether the proposed use of the property will have a detrimental effect on the future development of contiguous properties or the general area, according to the Comprehensive Plan, including any subsequent amendment to the plan adopted by the Council;

(6) Whether the proposed use of the property will result in the creation of objectionable or excessive noise, lights, vibrations, fumes, odors, dust or physical activities, taking into account existing uses or zoning in the vicinity;

(7) Whether the proposed use of the property will overburden existing public services and facilities;

(8) Whether the property will be sufficiently accessible to permit entry onto the property by fire, police, rescue and other services; and

(9) Whether the proposed use of the property will be consistent with the definition of a zoning exception,

> and will meet the standards and criteria of the zoning classification in which such use is proposed to be located, and all other requirements for such particular use set forth elsewhere in the Zoning Code, or otherwise adopted by the Planning Commission. (App. A at 25a-27a).

If the Planning Commission denies an application for zoning exception, the decision may be appealed to the City Council for a second hearing *de novo*. If the City Council then denies the application, it must issue a written order with express findings of fact evidencing that its decision was based upon the relevant land use criteria. *Irvine v. Duval County Planning Comm'n*, 495 So. 2d 167 (Fla. 1986). The applicant may appeal this order to the local circuit court, where the City then bears the burden of proving that its decision to deny the zoning exception was based on a substantial amount of legally competent evidence. *Id.*

II. DECISIONS OF THE LOWER COURTS

Respondents, Plaintiffs below, invoked the federal jurisdiction of the United States District Court for the Middle District of Florida by filing an action for declaratory and injunctive relief challenging the constitutionality of those portions of the City's zoning ordinance that placed certain locational restrictions on adult entertainment businesses. *See Lady J. Lingerie, Inc. v. City of Jacksonville*, 973 F. Supp. 1428 (M.D. Fla. 1997). (App. B at 35a). Upon consideration of the parties' cross-motions for summary judgment, the district court concluded that the issue presented was properly analyzed as a "time, place and manner" regulation pursuant to this Court's holding in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). *See Lady J. Lingerie*, 973 F. Supp. at 1436 (App. B. at 50a-51a). The district court further concluded that a genuine issue of material fact existed as to whether the zoning ordinance allowed for reasonable alternative avenues of communication and therefore denied summary judgment. *Id.*

Following a one-day trial, the district court found that there were ninety-five potentially available sites within the City where an adult entertainment business could locate; therefore, the court concluded that the City's zoning ordinance provided Plaintiffs with reasonable alternative avenues for communicating their message of eroticism.[6] *Id.* at 1437 (App. B at 52a-54a). In addition, the trial court rejected Plaintiffs' contention that the potential availability of sites requiring a special exception was illusory; that is, the court rejected Plaintiffs' assertion that the zoning exception criteria vested the City with unbridled discretion in considering such requests, thereby permitting it to deny requests for content-sensitive reasons. *Id.* at 1438 (App. B at 55a).

In reaching this conclusion, the district court relied upon the principles set forth by this Court for determining whether an otherwise valid law constitutes an unconstitutional prior restraint. *Id.* (citing *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969)) (App. B at 56a). Concluding that the criteria set forth permissible bases for land use restrictions that were specifically tied to factors other than "general welfare" considerations, the district court ruled that the zoning exception criteria contained "definite and objective standards" by which the City could make its decision. *Id.* at 1439-40 (App. B at 59a-60a). As such, the zoning exception criteria did not constitute an unlawful prior restraint for determining the appropriateness of a proposed location for an adult entertainment business.[7] *Id.* (App. B at 60a-62a).

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6. The district court's definition of "potentially available" sites included those parcels that were not affected by the minimum distance requirements for separating adult entertainment business from residences, schools, churches and other adult businesses. *Lady J. Lingerie*, 973 F. Supp. at 1437 (App. B at 52a-53a).

7. The district court did find one of the provisions to be unconstitutionally vague and therefore severed it from the ordinance. *Lady J. Lingerie*, 973 F. Supp. at 1440 (App. B at 60a-61a).

On appeal, the Eleventh Circuit employed a different analysis and reversed the decision of the district court. *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999). (App. A at 9a). Although the court of appeals conceded that "[w]e usually review zoning regulations in this area under the deferential 'time, place, or manner' standards which the Supreme Court delineated in *City of Renton v. Playtime Theatres, Inc.*," it nevertheless abandoned that framework in favor of the more stringent analysis traditionally reserved for reviewing business licensing regulations. *Id.* at 1361-63 (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990)) (App. A at 3a-4a). The court reasoned that the "time, place and manner" analysis did not apply unless the City could first establish that the requirements for obtaining a zoning exception did not amount to an unconstitutional prior restraint:

> Even if the [zoning] ordinance is narrowly tailored to serve a substantial government interest, it only allows for reasonable alternative avenues of expression if the 93-plus sites in the CCG-2 zone count. But to operate in the CCG-2 zone, an adult entertainment establishment must apply for an exception. This makes an exception the equivalent of a license.

Lady J. Lingerie, 176 F.3d at 1361 (App. A at 4a).

Upon equating the zoning exception to a business license, the court proceeded to engage in the two-pronged analysis reserved for determining the constitutionality of such licensing schemes. *Id.* (citing *Freedman v. Maryland*, 390 U.S. 51 (1965)). Thus, instead of simply ascertaining whether the zoning exception criteria gave the City "unbridled" discretion to deny such applications, the court also examined whether the zoning code contained adequate procedural

safeguards to ensure a prompt decision, thereby limiting any opportunity for undue delay in the decisionmaking process. *Id.* at 1362 (App. A at 4a). The court concluded that "Jacksonville's zoning exceptions process contains both defects." *Id.*

According to the Eleventh Circuit, "virtually any amount of discretion beyond the merely ministerial is suspect." *Id.* (App. A at 5a). Moreover, the court found that the absence of any firm deadline for the zoning board to render a decision constituted yet another unconstitutional prior restraint. *Id.* at 1363 (App. A at 7a). The City asserted that there was no threat of undue delay in that the Adult Entertainment and Services Code permits an applicant to begin operating its business (and communicating its constitutionally protected message) forty-five days after applying for a zoning exception. *Id.* (App. A at 7a). The court rejected this argument, as well. *Id.* (App. A at 8a).

Simply put, the Eleventh Circuit held that the zoning code afforded the City too much discretion to survive a constitutional attack:

> This ordinance . . . is unconstitutional because it channels nearly all adult entertainment establishments through the exceptions process. That process in turn gives the zoning board discretion to delay a decision indefinitely or to covertly deny applications for content-sensitive reasons.

Id. (App. A at 9a).

As more fully set forth in the following discussion, the opinion below not only conflicts with the decisions of other lower courts on two separate issues, but it is also fundamentally inconsistent with accepted Supreme Court

precedent regarding the well-established right of a local government to establish content-neutral land use regulations designed to preserve the quality of urban life for its citizens.

REASONS FOR GRANTING THE WRIT

The significance of the questions presented by this case extends well beyond the boundaries of the City of Jacksonville. These issues are of great public importance throughout the nation, as manifested by the conflicting analyses employed by the lower courts in evaluating the constitutionality of content-neutral land use provisions regulating the location of adult entertainment businesses, as well as the conflicting decisions regarding the degree of discretion which can constitutionally be exercised by local governments in planning the development of their communities.

Again, the constitutionality of the City's adult entertainment ordinance is not at issue. Rather, this is a challenge to the application of the City's *zoning* ordinance to adult entertainment businesses featuring nude dancing. In the words of former Supreme Court Justice Powell in the landmark case of *Young v. American Mini Theatres, Inc.*:

> I view the case as presenting an example of innovative land-use regulation, implicating First Amendment concerns only incidentally and to a limited extent.

427 U.S. 50, 73 (1976) (Powell, J., concurring).

This Court has long-recognized that a "city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *Id.* at 71. Although this in no way implies that the police power is immune from

constitutional scrutiny, "it also is undeniable that zoning, when used to preserve the character of specific areas of a city, is perhaps 'the most essential function performed by local government. . . .' " *Id.* at 80 (Powell, J., concurring) (quoting *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting)). The decision of the Eleventh Circuit, however, deviates from this Court's philosophy.

As reflected in the opinion below, the Eleventh Circuit accords a high regard for the expression at issue. This stands in stark contrast to what this Court has described as the "marginal" First Amendment rights of a nude dancing business to express its message of eroticism.[8] Although the precise level of protection provided by the First Amendment to this type of expression may be somewhat unclear, the Eleventh Circuit's conclusion that it is more deserving than the right of a community to regulate the permissible locations for such conduct does not comport with Supreme Court precedent. This Court has never extended the full spectrum of First Amendment protection to sexually explicit, but nonobscene, expression. *See Barnes v. Glen Theaters, Inc.*, 501 U.S. 560, 586 n.3 (1991) (Souter, J., concurring) ("[T]he protection of sexually explicit expression may be of lesser societal importance than the protection of other forms of expression."). In contrast, this Court has consistently accorded great deference to the power of local governments to implement local land use controls. *E.g., Young*, 427 U.S.

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8. *See Barnes v. Glen Theaters, Inc.*, 501 U.S. 560, 566 (1991) (characterizing nude dancing as "expressive conduct within the outer perimeters of the First Amendment"). Recently, this Court granted certiorari to review the decision of a state supreme court which concluded that "aside from the agreement by a majority of the *Barnes* Court that nude dancing is entitled to some First Amendment protection, we can find no point on which a majority of the *Barnes* Court agreed." *Pap's A.M. v. City of Erie*, 719 A.2d 273, 278 (Pa. 1998), *cert. granted*, 119 S. Ct. 1753 (May 17, 1999).

at 62 (describing the city's interest in planning and regulating the use of property for commercial purposes as "clearly adequate" to support a minimum distance requirement between adult theaters).

I. THE ANALYSIS EMPLOYED IN THE OPINION BELOW DIRECTLY CONFLICTS WITH THE DECISIONS OF THE SECOND CIRCUIT AND IS FUNDAMENTALLY INCONSISTENT WITH BOTH SUPREME COURT PRECEDENT AND SOUND PUBLIC POLICY.

The opinion below reflects the most recent example of the confusion that exists among the lower courts when examining the constitutionality of zoning ordinances that regulate the permissible locations of adult entertainment businesses by requiring them to first obtain a zoning exception. The Eleventh Circuit has embraced the position that such zoning regulations are the equivalent of a business licensing scheme.[9] *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999). As such, the opinion below concludes that the zoning ordinance must be analyzed as a form of prior restraint requiring adequate safeguards to protect against both unbridled discretion and the opportunity for indefinite delay in the decisionmaking process. *Id.* (citing *Freedman v. Maryland*, 380 U.S. 51 (1965)).

In contrast, the Second Circuit has recognized that these licensing scheme safeguards "are not applicable in every case

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9. The Fourth Circuit has previously drawn the same conclusion. *1126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 988 (4th Cir.), *cert denied*, 516 U.S. 1010 (1995). The lower courts of both the Ninth and Seventh Circuits have recently embraced this position, as well. *Le v. City of Citrus Heights*, 1999 WL 420153 (E.D. Cal. Feb. 11, 1999); *Special Souvenirs, Inc. v. Town of Wayne*, 1999 WL 478269 (E.D. Wis. July 7, 1999).

in which government permission must be sought prior to engaging in an expressive activity." *Crown Street Enterprises, Inc. v. City of New Haven*, 989 F. Supp. 420, 423 (D. Conn. 1997) (citing *Marty's Adult World v. Town of Enfield*, 20 F.3d 512 (2d Cir. 1994)). Rather, where a zoning ordinance does not ban an activity altogether, it should be analyzed as a "time, place and manner" regulation. *Marty's Adult World*, 20 F.3d at 515 (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)). The appropriate inquiry then becomes whether the ordinance serves a substantial government interest and allows for reasonable alternative avenues of communication. *Id.*; *see also Charette v. Town of Oyster Bay*, 159 F.3d 749 (2d Cir. 1998).

According to the Second Circuit, as well as the district court below,[10] a zoning ordinance that allows for reasonable alternative avenues of communication does not constitute a "licensing scheme." *Id.* Thus, a limitation on available sites — even if the available sites require a zoning exception — may be made so long as the limitation is *reasonable*. A determination of reasonableness, in turn, depends upon both the number of alternative locations available to the business and the degree of discretion afforded to the decisionmaker in granting or denying the zoning exception.

The decisions of the Eleventh, Fourth and Second Circuits reveal that the lower courts have failed to reach a consensus as to how the instant issue should be addressed. The constitutionality of this land use technique should be just as valid in Florida as it is in Connecticut, New York or any other state. Clearly, authoritative guidance is needed from

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10. *Lady J. Lingerie, Inc. v. City of Jacksonville*, 973 F. Supp 1428, 1437 (M.D. Fla. 1997) ("[T]he court finds as a matter of law that 95 sites [93 of which required a zoning exception] allow Plaintiffs 'reasonable avenues of alternative communication' under *Renton*.") (App. B at 54a).

this Honorable Court on an issue of paramount importance to local governments throughout the nation.

A. The "time, place and manner" doctrine governs the constitutionality of zoning provisions which regulate the permissible locations of proposed uses of land; this Court's prior restraint analysis in *FW/PBS v. City of Dallas* is limited to business licensing schemes.

Content-neutral zoning ordinances designed to regulate the secondary effects resulting from the operation of sexually oriented businesses have traditionally been examined as "time, place and manner" regulations. *See City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini-Theaters, Inc.*, 427 U.S. 50 (1976). This Court has long-recognized that local governments have a substantial interest in protecting their neighborhoods from the adverse secondary effects of such businesses. The constitutionality of these regulations therefore turns on whether they afford reasonable alternative avenues of communication. *Renton*, 475 U.S. at 54.

A business licensing scheme, in contrast, will be closely scrutinized to ensure both that the business is not subject to the unbridled discretion of a government official and that the licensing scheme contains adequate procedural safeguards. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). In *FW/PBS*, this Court examined the narrow issue of "whether a licensing scheme in a comprehensive city ordinance regulating sexually oriented businesses is a prior restraint that fails to provide adequate procedural safeguards as required by *Freedman v. Maryland*." *Id.* at 220 (citing 380 U.S. 51 (1965)). Significantly, this Court did *not* examine the constitutionality of the zoning provisions which regulated the *location* of sexually oriented businesses:

> Because we conclude that the city's *licensing* scheme lacks adequate procedural safeguards, we do not reach the issue decided by the Court of Appeals whether the ordinance is properly viewed as a content-neutral time, place, and manner restriction aimed at secondary effects arising out of the sexually oriented businesses.

Id. at 223 (emphasis added).

In the opinion below, the Eleventh Circuit analyzed the City's zoning ordinance as a business licensing scheme "because it channels nearly all adult entertainment establishments through the exception process." *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1363 (11th Cir. 1999). This determination, however, does not comport with Supreme Court precedent.

This Court's holding in *FW/PBS* does not stand for the proposition that licensing scheme safeguards are applicable in every case in which government permission must be sought prior to operating a business that enjoys some degree of First Amendment protection. That is, the full range of prior restraint safeguards are not applicable where a business has a reasonable opportunity to communicate its message in alternative locations. *See Renton*, 475 U.S. at 54 ("In our view, the First Amendment requires only that [local governments] refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city. . . ."). Where, as here, the zoning regulations do not categorically ban the operation of adult entertainment establishments throughout the city, but rather accord them a presumptive right to operate in a specific zoning district, the ordinance must be examined as a time, place and manner regulation pursuant to *Renton*.

In sum, the critical distinction between a *FW/PBS* licensing scheme and a *Renton* time, place and manner regulation is that a licensing scheme determines whether the business can operate *anywhere*, regardless of the zoning district. A zoning exception scheme, in contrast, regulates whether a particular land use is appropriate for a particular location within a particular zoning district, taking into account the potential secondary impacts of the proposed land use on surrounding properties and the consistency of the use with a city's comprehensive plan for future development. The decisive issue then becomes one of reasonableness; namely, whether the zoning regulation affords a reasonable opportunity for the message to be expressed in alternative locations that are presumptively available for that particular land use. *See Lady J. Lingerie, Inc. v. City of Jacksonville*, 973 F. Supp. 1428, 1437 (M.D. Fla. 1997) (concluding that, as a matter of law, ninety-five potentially available sites allow for "reasonable avenues of alternative communication" under *Renton*).

The opinion below completely disregards this critical distinction and instead embraces the approach taken by the Fourth Circuit Court of Appeals. This reasoning expressly conflicts with that employed by the Second Circuit, and it is fundamentally inconsistent with the precedent of this Court.

B. Subjecting local governments to the two-pronged prior restraint analysis of *Freedman v. Maryland* unreasonably denies them the ability to effectively plan the development of their communities and fails to take into account the precise form of expression.

As a matter of policy, the *Freedman* standards for examining a potentially unconstitutional system of prior restraint are ill-suited for zoning exception schemes. Although any system of prior restraint should contain

adequate safeguards to protect against unbridled discretion, the system need not always protect against the opportunity for indefinite delay in order to pass constitutional muster. In fact, this Court has expressly recognized that, for purposes of prior restraint analysis:

> Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975).

In *FW/PBS*, this Court held that two safeguards are essential to providing adequate protection against the opportunity for indefinite delay in a business licensing scheme. *FW/PBS*, 493 U.S. at 228. First, the licensing scheme must provide for an effective limitation on the time within which the licensor's decision must be made. *Id.* at 229. In addition, it must also provide an avenue for prompt judicial review so as to minimize suppression of the speech in the event of a license denial. *Id.* Because of the precise form, or medium, of expression involved in nude dancing, neither of these safeguards apply. Unlike other forms of expression such as films, parades, demonstrations, leaflets, print materials and spoken messages, nude dancing is not time-sensitive. As recently stated by the Fourth Circuit:

> Topless dancing does not go similarly stale — it tends not to be keyed to external events, and the strength of whatever message it conveys remains more or less constant over time.

Steakhouse, Inc. v. City of Raleigh, 166 F.3d 634, 641 (4th Cir. 1999).

Moreover, the actual "message" being conveyed here suggests that the application of these added safeguards may not necessarily be warranted. This Court has repeatedly recognized that sexually explicit nude dancing is not exactly the type of protected "speech" contemplated by the Framers of our Constitution. *See Barnes v. Glen Theaters, Inc.*, 501 U.S. 560, 566 (1991) ("[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so."); *Young v. American Mini-Theaters, Inc.*, 427 U.S. 50, 70 (1976) (finding "society's interest in protecting [erotic] expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate"); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) ("[T]he customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression.").

Similarly, this Court has expressly stated that there are "commonsense differences" between commercial speech and other varieties of expression. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 n.24 (1976). These differences are so great, in fact, that this Court has suggested that traditional prior restraint doctrine simply may not apply to commercial forms of speech. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 571 n.13 (1980). If this doctrine has no application in the commercial speech arena, then the full procedural safeguards of *Freedman* should not be extended to a form of expression that falls "within the outer perimeters of the First Amendment." *See Barnes*, 501 U.S. at 566.

It bears repeating that the City's zoning regulations are content-neutral, and any effect on constitutionally protected expression is both incidental and of limited duration. For example, the City's Adult Entertainment and Services Code provides that an applicant has the right to begin operating

its business within forty-five days after applying for a license, even though a decision has not yet been made on the request for a zoning exception. The Eleventh Circuit, however, concluded that this "conditional exception is no exception at all." *Lady J. Lingerie*, 176 F.3d at 1363) ("A business can scarcely afford to operate in limbo, not knowing whether the City will shut it down the next day or not.") (App. A at 8a). The City respectfully submits that the First Amendment simply guarantees the right to freely communicate one's *message*; it does *not* guarantee the right to operate a business and make a profit. In the words of Justice Scalia:

> It is necessary, to be sure of protecting valuable speech, that we compel all communities to tolerate individual works that have only marginal communicative content beyond raw sexual appeal; it is not necessary that we compel them to tolerate *businesses* that hold themselves forth as specializing in such material.

FW/PBS v. City of Dallas, 493 U.S. 215, 253 (1990) (Scalia, J., dissenting) (emphasis added); *see also City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 54 (1986) ("[W]e have never suggested that the First Amendment compels the government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices.").

Finally, as a policy matter, zoning decisions should not be subject to the same type of expedited review that is accorded to other forms of time-sensitive expression. The primary purpose of zoning regulations is to effectively plan the orderly development and use of land. By definition, planning decisions take time. Although these decisions may incidentally suppress the exercise of protected speech, this suppression is of limited duration. In contrast, the effect of a

hasty zoning decision will have *permanent* repercussions on the character of the community at large.

A determination of whether an adult entertainment business is consistent with the City's comprehensive plan for future development and compatible with surrounding land uses is no small task. The City's professional planning staff must undertake a detailed review of the proposed land use and prepare a written report and recommendation for the Planning Commission's consideration. Mailed notices to affected property owners must be distributed, signs advertising the date and time of the hearing must be posted for a specified period, and details of the application must be published in a local newspaper of general circulation. Afterwards, the Commission's reporter must transcribe the hearing, and the Commission's lawyer must prepare preliminary findings of fact and conclusions of law. In short, the interests of the community in well-reasoned planning decisions must surely prevail over the "marginal" First Amendment interest in erotic dancing.

II. THE OPINION BELOW DIRECTLY CONFLICTS WITH THE CONCLUSION OF THE FOURTH CIRCUIT THAT CONTENT-NEUTRAL ZONING EXCEPTION CRITERIA DO NOT GRANT "UNBRIDLED DISCRETION" TO THE DECISIONMAKERS.

Despite the recent holding of the Fourth Circuit Court of Appeals in *Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634 (4th Cir. 1999), the Eleventh Circuit concluded that the City's criteria for reviewing zoning exception applications accord "unbridled discretion" to the decisionmakers, thereby violating the First Amendment as an unconstitutional prior restraint.

In *Steakhouse*, a developer sought to construct a topless dancing bar in a zoning district that required it to first obtain a special use permit. *Id.* at 636. In Raleigh, as in Jacksonville, an independent, quasi-judicial body[11] reviews applications for special use permits pursuant to the criteria for such permits set forth in the city's zoning code. *Id.* Both Raleigh and Jacksonville use virtually identical zoning criteria for reviewing these types of applications. *Id.* Specifically, the criteria include specific parking, advertising, concentration and distance requirements, and they also provide that applicants must demonstrate that the proposed use of their property will not adversely affect public services and facilities such as parking, traffic and police. *Id.* These criteria also require applicants to show that the "secondary effects" of the proposed use — including such things as noise, light, storm water runoff, parking and pedestrian circulation — will not adversely affect adjacent properties. *Id.*

This special use permit scheme was challenged as being an unconstitutional prior restraint because, according to the developer, the zoning criteria failed to sufficiently limit the board's discretion. *Id.* at 638-39. The Fourth Circuit disagreed. Distinguishing the criteria at issue from the "general welfare" provisions struck down by this Court in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), the Fourth Circuit concluded:

> Rather than allowing the decisionmaking body to manipulate such malleable concepts as local welfare, decency, and good order, [the zoning criteria] channels the [Board's] discretion, forcing it to focus on concrete topics that generate palpable effects on the surrounding neighborhood.

Steakhouse, 166 F.3d at 639.

11. The quasi-judicial body which reviews special use permits in Raleigh is called the Board of Adjustment. *Steakhouse*, 166 F.3d at 636. In Jacksonville, that body is the Planning Commission.

In effect, the Fourth Circuit recognized that these planning decisions necessarily entail *some* degree of discretion, consistent with the holdings of this Court that it is the potential for *unbridled* discretion that renders a prior restraint scheme susceptible to a facial attack. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988). Although the Eleventh Circuit acknowledged this principle, it nevertheless proceeded to reject it:

> . . . [V]irtually *any* amount of discretion beyond the merely ministerial is suspect. Standards must be precise and objective.
>
> Such is not the case with [the Jacksonville zoning exception criteria]. None of the criteria is precise and objective. All of them — individually and collectively — empower the zoning board to covertly discriminate against adult entertainment establishments under the guise of general "compatibility" or "environmental" considerations.

Lady J. Lingerie, Inc. v. City of Jacksonville, 176 F.3d 1358, 1362 (11th Cir. 1999) (emphasis added) (citations omitted) (App. A at 5a-6a).

Not only does this conclusion directly conflict with that of the Fourth Circuit, but it also completely disregards both the teachings of this Court and the detrimental impact that such a result would have on local planning practices. In *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988), this Court struck down a permit scheme that allowed the mayor to reject applications for unidentified reasons related to the general health, safety, or welfare of the city's citizens. Delivering the opinion of the Court, Justice Brennan declared:

> The doctrine [of prior restraint] requires that the limits the city claims are implicit in its law be made *explicit* by textual incorporation, binding judicial or administrative construction, or well-established practice.

Lakewood, 486 U.S. at 770 (emphasis added).

Consistent with *Lakewood*, the City has explicitly incorporated specific criteria and standards to limit the degree of discretion in reviewing an application for zoning exception. Moreover, the Florida Supreme Court has imposed additional safeguards. In Florida, zoning exceptions are considered to be a permitted use to which the applicant is *entitled*, unless the zoning authority determines — according to the standards and criteria contained in the zoning ordinance — that such use would adversely affect the public interest. *Irvine v. Duval County Planning Comm'n*, 495 So. 2d 167 (Fla. 1986). A decision to deny a zoning exception will only be sustained if the final order contains detailed findings of fact evidencing that the record contained "substantial competent evidence" to support a conclusion that the applicant did not meet the requisite exception criteria. *Id.* Thus, "binding judicial construction" provides yet another check on the potential for unbridled discretion in the decisionmaking process.

This secondary level of procedural safeguards stands in stark contrast to the constitutional infirmities this Court found in *Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992), where Justice Blackmun stated:

> Based on the county's implementation and construction of the ordinance, it simply cannot be said that there are any "narrowly drawn, reasonable and definite standards" guiding the

> hand of the Forsyth County administrator. The decision how much to charge for police protection or administrative time — or even whether to charge at all — is left to the whim of the administrator. *There are no articulated standards either in the ordinance or in the county's established practice. The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable.*

Id. at 132-33 (emphasis added).

The same simply cannot be said of the City of Jacksonville's zoning exception criteria. The ordinance contains specific standards to channel the Planning Commission's review. Pursuant to Florida law, these types of quasi-judicial zoning authorities *must* rely on substantial competent evidence in order to deny the exception, and their decision must be reduced to a written order with detailed findings of fact. Additionally, the applicant is entitled to judicial review as a matter of right.

In sum, the opinion below completely fails to take into account the well-established precedent of this Court regarding the doctrine of prior restraint and the permissible degree of allowable discretion. Similarly, the opinion fails to recognize the undesirable consequences that would result from such a construction.

Although it makes perfect sense to significantly limit the discretion of an administrative officer charged with nothing more than the ministerial tasks associated with reviewing parade permits, the same cannot be said for independent, quasi-judicial zoning authorities charged with professional planning functions. The Jacksonville Planning

Commission, as its name suggests, is a *planning* board, not a censorship board. Its job is to ensure that certain uses of land are appropriately located, considering such factors as the consistency of the proposed use with the City's comprehensive plan for future development and its compatibility with the surrounding area. Relegating its role to nothing more than a ministerial body runs directly counter to the very reason for its existence. Surely, the First Amendment does not compel such a result.

CONCLUSION

This case presents questions of exceptional importance regarding the authority of local governments to perform one of their most essential functions. Again, this is a land use case, with constitutional implications. Contrary to the opinion of the Eleventh Circuit, the City's zoning ordinance permissibly regulates the time, place and manner in which the operators of adult entertainment businesses may conduct their operations. It does not seek to suppress their First Amendment rights, but rather operates to preserve the quality of life for the citizens of the City of Jacksonville. And it does so within the constitutional parameters of the prior restraint doctrine.

For the foregoing reasons, the City respectfully petitions this Honorable Court for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DATED MAY 27, 1999

LADY J. LINGERIE, INC., a Florida corporation; Buford B. Breland, et al., Plaintiffs-Appellants,

v.

CITY OF JACKSONVILLE, a Florida municipal corporation, Defendant-Appellee.

Milton R. Howard, Emro Corporation, d.b.a. J.R.'s Lounge, Plaintiffs-Appellants,

v.

City of Jacksonville, a Florida municipal corporation, Defendant-Appellee.

Nos. 98-2088, 98-2207.

United States Court of Appeals,
Eleventh Circuit.

May 27, 1999.

* * *

Appendix A

Before DUBINA and BARKETT, Circuit Judges, and JONES*, Senior Circuit Judge.

DUBINA, Circuit Judge:

These consolidated cases require us to determine *de novo* the constitutionality of several provisions of a Jacksonville, Florida (the "City") ordinance that subjects adult businesses to various licensing, health and safety, and zoning regulations. The plaintiffs/appellants are "lingerie shops" that showcase nude dancing. The City classifies them as "adult entertainment establishments." Jacksonville, Fla. Adult Ent. & Serv.Code § 150.103(c) (reprinted in appendix). The district court initially agreed with some of the plaintiffs' objections to the ordinance and preliminarily enjoined enforcement of the licensing and zoning provisions. In response, the City amended its ordinance. The district court lifted its injunction and upheld most of the provisions of the new ordinance. *See Lady J. Lingerie, Inc. v. City of Jacksonville,* 973 F.Supp. 1428 (M.D.Fla.1997). The plaintiffs then perfected this appeal.

I.

First we decide whether regulations requiring adult entertainment establishments to apply for zoning exceptions comply with the First Amendment. The City permits adult entertainment establishments to operate as of right in only one area, the CCBD (Commercial/Central Business District)

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* Honorable Nathaniel R. Jones, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

zone. They may also operate in the CCG-2 (Commercial Community/General-2) zone, but only if the zoning board grants them a zoning exception. *See* Jacksonville, Fla. Land Use Code § 656.313(IV)(c)(7) (reprinted in appendix). In addition, the ordinance forbids adult businesses in either zone from locating within specified distances of residences, schools, churches, bars or other adult businesses. *See* Jacksonville, Fla. Land Use Code § 656.1103(a) (reprinted in appendix).

The main objection the plaintiffs have to the ordinance is that there are only *two* sites in the CCBD zone that comply with the distance requirements. This means that practically all adult entertainment establishments must apply for a zoning exception to operate anywhere in the City. The City concedes this, but argues that there are 93-plus available sites in the CCG-2 zone, and that we should include those sites in the calculation. The combined 95 sites, it maintains, are enough.

We usually review zoning regulations in this area under the deferential "time, place, or manner" standards which the Supreme Court delineated in *City of Renton v. Playtime, Theatres, Inc.*, 475 U.S. 41, 50-54, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *see also Int'l Eateries of America, Inc. v. Broward Co., Fla.*, 941 F.2d 1157, 1161-65 (11th Cir.1991). A zoning ordinance is valid if it is narrowly tailored to serve a substantial government interest, and it allows for reasonable alternative avenues of expression. *See Int'l Eateries*, 941 F.2d at 1161-65. Combating the harmful secondary effects of adult businesses, such as increased crime and neighborhood blight, is a substantial government interest. *See City of Renton*, 475

U.S. at 50-52, 106 S.Ct. 925; *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 583-84, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (Souter, J., concurring in the judgment).

Most zoning ordinances easily meet these standards, but this ordinance does not. Even if the ordinance is narrowly tailored to serve a substantial government interest, it only allows for reasonable alternative avenues of expression if the 93-plus sites in the CCG-2 zone count. But to operate in the CCG-2 zone, an adult entertainment establishment must apply for an exception. This makes an exception the equivalent of a license. The City does have a separate licensing procedure for adult entertainment establishments (for which, incidentally, a zoning exception is a prerequisite), but the indispensability of the zoning exception persuades us to treat it like a license as well.

As a form of prior restraint, licensing schemes commonly contain two defects: discretion and the opportunity for delay. An ordinance that gives public officials the power to decide whether to permit expressive activity must contain precise and objective criteria on which they must make their decisions; an ordinance that gives too much discretion to public officials is invalid. *See Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969). Licensing ordinances must also require prompt decisions. An ordinance that permits public officials to effectively deny an application by sitting on it indefinitely is also invalid. *See Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). Jacksonville's zoning exceptions process contains both defects.

Appendix A

A. *Discretion*

Section 656.131 of the Jacksonville Land Use Code specifies the procedures for obtaining a zoning exception. *See* Jacksonville, Fla. Land Use Code § 656.131 (reprinted in appendix). The procedures apply to applicants of all sorts — not just adult businesses. Subsection (c)(1) contains the criteria the zoning board must consider in deciding whether to grant exceptions. These are run-of-the-mill zoning considerations: compatibility with contiguous uses, environmental impact, effect of pedestrian traffic, and so on. But they are just a floor; subsection (c)(2) permits the board to impose more restrictive requirements on applicants.

The district court held that subsection (c)(2) is unconstitutional, and severed that provision from the rest of the ordinance. The City does not appeal that part of the judgment. Instead, the plaintiffs appeal the part of the judgment that upheld all of the (c)(1) criteria. The district court found that these factors (in the absence of subsection (c)(2)) sufficiently limit the board's discretion. We disagree.

The standard incantation of the *Shuttlesworth* principle is that statutes may not give public officials "unbridled" discretion to deny permission to engage in constitutionally protected expression. *E.g., City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988) (citing *Shuttlesworth,* 394 U.S. at 151, 89 S.Ct. 935). This implies that some measure of discretion is acceptable, but the cases show that virtually any amount of discretion beyond the merely ministerial is suspect. Standards must be *precise* and *objective. See, e.g., Shuttlesworth,* 394

U.S. at 150-51, 89 S.Ct. 935 ("narrow, objective, and definite"); *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater,* 2 F.3d 1514, 1547-48 (11th Cir.1993) ("definite and precise"); *see also Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981) (upholding "first-come, first-served" method of allocating booths at the state fair); *Church of Scientology,* 2 F.3d at 1548 (labeling city clerk's duty to obtain information from applicants for solicitation licenses "purely ministerial").

Such is not the case with subsection (c)(1). None of the nine criteria is precise and objective. All of them — individually and collectively — empower the zoning board to covertly discriminate against adult entertainment establishments under the guise of general "compatibility" or "environmental" considerations. Jacksonville, Fla. Land Use Code § 656.131(c)(1)(ii) & (iii). Even the seemingly-innocuous fire safety provision is too broad. It does not say "there must be *x number* of doors per square foot"; it says that buildings must be "*sufficiently accessible* to permit entry onto the property by fire, police, rescue and other services." *Id.* § 656.131(c)(1)(viii) (emphasis added). This is neither precise nor objective.

To be clear, the City may still use the (c)(1) criteria (and (c)(2), for that matter) for applicants who are not entitled to First Amendment protection. We only find troublesome the application of the otherwise-valid zoning criteria to adult businesses like the plaintiffs'.

B. *Delay*

The opportunity for public officials to delay is another form of discretion. Recognizing this, the Supreme Court held in *Freedman* that a Maryland movie censorship law violated the First Amendment because it did not require prompt decisions. In a later case, *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (plurality opinion), a majority of the Court (the plurality plus three concurring Justices) applied *Freedman* to an adult business licensing scheme. *See also id.* at 238, 110 S.Ct. 596 (Brennan, J., concurring). Specifically, the Court agreed that ordinances must contain two procedural safeguards to ensure prompt decision-making: (1) licensing officials must be required to make prompt decisions; and (2) prompt judicial review must be available to correct erroneous denials. *See id.* at 228-30, 110 S.Ct. 596; *Redner v. Dean,* 29 F.3d 1495, 1500 (11th Cir.1994). The same safeguards are required here.

First, the ordinance fails to put any real time limits on the zoning board. The board must hold a public *hearing* within 63 days after a business applies for an exception. *See* Jacksonville, Fla. Land Use Code § 656.131(c)(4). But nothing requires a *decision* within 63 days, or any other time period. The ordinance's failure to require a deadline for decision renders it unconstitutional. *See Redner,* 29 F.3d at 1501.

The City concedes that the ordinance does not give the zoning board a deadline for decision, but it points out that the ordinance permits an applicant to begin operating its business 45 days after applying. *See* Jacksonville, Fla. Land

Use Code § 656.1109 (reprinted in appendix). Once the board denies an application, the applicant must shut down. *See id.* The City argues that this ensures that a delay in the decision-making process will not keep the plaintiffs from opening.

The defendant county in *Redner* made a similar defense of its ordinance. But that ordinance said that an applicant "may be permitted" to open; it didn't give applicants an absolute right to open. 29 F.3d at 1500-01. The Jacksonville ordinance, in contrast, says that an applicant "may begin operating [his] facility" 45 days after applying. Jacksonville, Fla. Land Use Code § 656.1109. This leaves no discretion in the City's hands to keep an adult business closed before denying its request for an exception.

Does it matter that an applicant may begin operating while the board is still considering its application? We think not. The ordinance only permits applicants to operate conditionally. Once the board denies an application for an exception, the applicant must close its doors. A conditional exception is no exception at all. A business can scarcely afford to operate in limbo, not knowing whether the City will shut it down the next day or not. Further, *Freedman*'s requirement that the status quo be maintained while public officials are deciding does not eliminate the requirement that the decision itself must be prompt. (And anyway, the status quo here is no zoning exception.)

As for the second procedural safeguard, we note that this ordinance does not specifically provide for prompt judicial review of the zoning board's decisions. This may not be fatal. We have never squarely held that an explicit

judicial review provision is essential. It may be enough that state law provides a general right to judicial review of administrative decisions. *See Redner,* 29 F.3d at 1501-02 & n. 9 (discussing *Cent. Florida Nuclear Freeze Campaign v. Walsh,* 774 F.2d 1515 (11th Cir.1985), and *Miami Herald Publishing Co. v. City of Hallandale,* 734 F.2d 666, 676 (11th Cir.1984)). Still, the plaintiffs have not argued this issue on appeal, so we leave it undecided.

To conclude, we want to emphasize that it is not difficult to draft an ordinance that addresses the harmful secondary effects of adult businesses without running afoul of the First Amendment. This ordinance, however, is unconstitutional because it channels nearly all adult entertainment establishments through the exceptions process. That process in turn gives the zoning board discretion to delay a decision indefinitely or to covertly deny applications for content-sensitive reasons. The plaintiffs may operate as of right in the CCBD and CCG-2 zones, as long as they comply with the distance limitations. We leave it to the district court on remand to decide whether they may also operate in other parts of the City.

II.

Next, the plaintiffs challenge two content-neutral provisions: first, an hours of operation rule that requires adult entertainment establishments to close from 2:00 a.m. until noon every day, and second, a rule requiring that rooms in adult entertainment establishments be at least 1000 square feet in area. These rules are content-neutral because the City enacted them not to suppress the expressive content of nude

dancing, but to alleviate the harmful secondary effects with which adult businesses are commonly associated.

First we must choose which test applies to these regulations. There are two possibilities. The first is the "time, place, or manner" test the Supreme Court used to evaluate the zoning regulations in *City of Renton*. The Court initially developed this test to review restrictions on expression taking place in public fora, but in *City of Renton*, it used this test to evaluate the validity of zoning regulations. *See Barnes*, 501 U.S. at 566, 111 S.Ct. 2456 (plurality opinion) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), and *City of Renton*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29). *City of Renton* says that a "time, place, or manner" regulation must be narrowly tailored to serve a substantial government interest, and it must allow for reasonable alternative avenues of expression. *See* 475 U.S. at 50-54, 106 S.Ct. 925; *Int'l Eateries*, 941 F.2d at 1161-65.

The alternative is the four-part test the Court laid out in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). This test has been used to evaluate regulations of expressive conduct — conduct that contains both "speech" and "nonspeech" elements. *Id.* at 376, 88 S.Ct. 1673. In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (plurality opinion), both the plurality and Justice Souter, *see id.* at 581, 111 S.Ct. 2456 (Souter, J., concurring in the judgment), used this test to resolve a challenge by nude dancing establishments to a state law that banned public nudity. The test permits government regulation of expressive conduct "if it is within the

constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien,* 391 U.S. at 377, 88 S.Ct. 1673.

The Supreme Court has observed that the expressive conduct test of *O'Brien* and *Barnes* and the "time, place, or manner" test of *City of Renton* "embody much the same standards." *Barnes,* 501 U.S. at 566, 111 S.Ct. 2456 (plurality opinion) (discussing *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 298 & n. 8, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)). Still, which test we choose at least determines how we approach these questions, even if it doesn't affect the outcome. And for that matter, our choice of which test to use may occasionally be outcome determinative. In *Ward,* for instance, a "time, place, or manner" case, the Court said that the means chosen are narrowly tailored as long as they are "not substantially broader than necessary to achieve the government's interest." 491 U.S. at 800, 109 S.Ct. 2746. Contrast this with *O'Brien,* in which the Court said that regulation of expressive conduct may be "no greater than is essential to the furtherance of [the government's] interest." 391 U.S. at 377, 88 S.Ct. 1673. The Court is surely right to suggest that these tests are *generally* the same. *See Clark,* 468 U.S. at 298, 104 S.Ct. 3065 (*O'Brien*'s four-part test, "in the last analysis, is little, if any, different from the standard applied to time, place, or manner restrictions"). But in the occasional case, there may be a difference between "not substantially broader" and "no greater than is essential."

We need not decide whether this is that occasional case. We decide only one case at a time, and in this case, *City of Renton* guides our inquiry. The *City of Renton* test is appropriate because the rules we consider today — the hours of operation and 1000 square foot provisions — regulate "time" and "place" in the "time, place, or manner" sense. They affect, but do not directly regulate, the expressive conduct that is the basis of the plaintiffs' First Amendment challenges: nude dancing. The draft card burning statute in *O'Brien* and the indecency law in *Barnes* regulated the *how* of expressive conduct, as opposed to the where or the when, and they did so in a way that made the messages less potent. The hours of operation and 1000 square foot rules are different.

City of Renton requires that these rules be narrowly tailored to serve a substantial government interest, and that they allow for reasonable alternative avenues of expression. *See* 475 U.S. at 50-54, 106 S.Ct. 925; *Int'l Eateries,* 941 F 2d at 1161-65. A rule is narrowly tailored as long as it is "not substantially broader than necessary to achieve the government's interest." *Ward,* 491 U.S. at 800, 109 S.Ct. 2746.

Whether the hours of operation rule is valid is a close question. *See* Jacksonville, Fla. Adult Ent. & Serv.Code § 150.422(a) (reprinted in appendix). When we asked counsel for the City at oral argument why the City requires adult entertainment establishments to close from 10:00 a.m. until noon (the plaintiffs limit their argument to these hours), he could not come up with a reason. Nor can we. The question is whether we need a reason.

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The plaintiffs concede that ample evidence exists to justify requiring them to close during the late evening hours, so the hours of operation rule *as a whole* indisputably serves a substantial government interest. But the plaintiffs would have us look at the City's reasons for this rule on an hour by hour basis. There is no evidence, they submit, of a substantial government interest to justify requiring adult businesses to close from 10:00 a.m. until noon. This is a clever argument, but it confuses the requirement that a regulation serve a substantial government interest with the requirement that it be narrowly tailored to that end. We look at the provision *as a whole* to decide whether it serves a substantial government interest. Since it does, we ask whether it is narrowly tailored.

We can imagine an hours of operation rule drawn so broadly as to not be narrowly tailored, but we decline to scrutinize the City's reasons for this rule as closely as the plaintiffs would have us do. If we were to side with the plaintiffs here, the next litigants would argue whether evidence of secondary effects at 6:15 in the morning justifies requiring adult businesses to close at 9:30, or whether evidence from 9:30 justifies requiring them to close at 10:45. That sort of line-drawing is inconsistent with a narrow tailoring requirement that only prohibits regulations that are "substantially broader than necessary." *Ward,* 491 U.S. at 800, 109 S.Ct. 2746; *but cf. O'Brien,* 391 U.S. at 377, 88 S.Ct. 1673 (regulation may be no greater than is *essential* to the government interest). The issue we face today is, of course, a closer question, but we conclude that the hours of operation rule is "not substantially broader than necessary." It is therefore narrowly tailored. Since the rule also leaves open reasonable alternative avenues of expression — adult

businesses may stay open fourteen hours a day, seven days a week — it is valid.

We also conclude that the 1000 square foot rule is valid. *See* Jacksonville, Fla. Adult Ent. & Serv.Code § 150.301(g) & (h) (reprinted in appendix). Ample evidence, from Jacksonville and elsewhere, supports the district court's finding that illegal and unhealthy activities take place in small rooms at adult entertainment establishments. One thousand square feet is not that large, so we can't say that this rule is substantially broader than necessary.

Still, the plaintiffs argue that the 1000 square foot rule will force them to move. At least two of the plaintiffs can't comply in their present locations. One plaintiff's total floorspace is only 850 square feet, and another can't remodel because of structural constraints. As we see it, though, this doesn't matter. The test is whether the regulation leaves open reasonable *alternative* avenues of expression; it does not guarantee that the plaintiffs will be able to operate in their present locations.

Without the zoning ordinance confining them, there are plenty of places the plaintiffs can move to comply with this rule. The plaintiffs' own expert testified that at least 40% of the available sites in Jacksonville are large enough to accommodate 1000 square foot rooms. There is no evidence to indicate that this figure is not also representative of the CCG-2 zone. Forty percent of 93-plus sites is enough.

Appendix A

III.

The plaintiffs next challenge the validity of a provision that makes an applicant ineligible for an adult entertainment license if the Sheriff has recently revoked a license for the same premises. *See* Jacksonville, Fla. Adult Ent. & Serv.Code § 150.214 (reprinted in appendix). A site is ineligible until the second October 1 after the Sheriff revokes the license. *Id.* This site disability provision applies even to an applicant with a clean record who happens to buy or lease an affected site for use as an adult entertainment establishment.

We conclude that none of the plaintiffs has standing to challenge this provision because none is injured. Not only has none of the plaintiffs applied for a license for an affected site, but there is no evidence that there are any affected sites in Jacksonville. If there were, the plaintiffs could at least say that the site disability provision limits their choice of where to move. But without evidence of affected sites, the plaintiffs can't even say that. So we dismiss this claim.

IV.

We now turn our attention to a provision that requires corporate applicants for adult business licenses to disclose the names of "principal stockholders." Jacksonville, Fla. Adult Ent. & Serv.Code § 150.205(a)(1)(iii) (reprinted in appendix). A "principal stockholder" is one who owns at least 10% of the stock of a corporation. *Id.* § 150.103(k) (reprinted in appendix). If no stockholder owns more than 10%, then all stockholders are "principal stockholders." *Id.*

The plaintiffs argue that this unconstitutionally chills their right to free expression. The City responds that the plaintiffs do not have standing to challenge this provision, but that even if they do, the disclosure provision is valid.

We are satisfied that at least one of the plaintiffs has standing to challenge this rule. The ordinance requires corporations to disclose principal stockholders' names, and Lady J. Lingerie is a corporation.

Compelled disclosure of the sort the Jacksonville ordinance entails threatens to stymie the exercise of First Amendment freedoms — the so-called "chilling effect" — so it must survive "exacting scrutiny." *Buckley v. Valeo*, 424 U.S. 1. 64, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam). Specifically, there must be a "relevant correlation" or a "substantial relation" between requiring disclosure of principal stockholders' names and a substantial government interest. *Id.* (citations omitted); *see also NAACP v. Alabama*, 357 U.S. 449, 463-64, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) (government interest must be substantial).

Here the government interest is substantial, but we do not see a "relevant correlation" or a "substantial relation" between the names of principal stockholders and the harmful secondary effects of adult entertainment establishments. The City's best argument is that principal stockholders tend to have a discernable influence on management, and that the City needs to keep an eye on who is running adult businesses in town. But stockholders, *qua* stockholders, do not run corporations; officers and directors do. The City can enforce its rules through them. *See Acorn Inv., Inc. v. City of Seattle*,

887 F.2d 219, 226 (9th Cir.1989); *cf. East Brooks Books, Inc. v. City of Memphis,* 48 F.3d 220, 226 (6th Cir.1995) (invalidating an ordinance requiring disclosure of all stockholders' names); *Genusa v. City of Peoria,* 619 F.2d 1203, 1216-17 (7th Cir.1980) (invalidating an ordinance requiring all stockholders owning more than 10% of the stock of an applicant to submit various personal data to licensing officials). Accordingly, we conclude that this provision is unconstitutional.

V.

The final provision the plaintiffs challenge makes owners of adult entertainment establishments criminally liable for acts committed by their servants, agents and employees. *See* Jacksonville, Fla. Adult Ent. & Serv.Code § 150.510 (reprinted in appendix). Not all acts are imputable, only those acts done within a servant, agent or employee's scope of authority under the owner. *See id.* § 150.510(b). For their first five convictions, owners are punished by either a fine *or* 10 days in jail; for the sixth and subsequent offenses, the penalty is a fine *and* up to 90 days in jail. *See id.* § 150.510(c).

Respondeat superior is a familiar concept in the context of "public welfare" crimes. These offenses are not crimes in the traditional sense; instead, they are a means of regulating activities that pose a special risk to the public health or safety. In *United States v. Park,* 421 U.S. 658, 95 S.Ct. 1903, 44 L.Ed.2d 489 (1975), for example, the defendant was the president of a national retail food corporation that got into trouble with the Food and Drug Administration for having rodent-infested warehouses. The Court upheld his conviction

because, as president, he was in a "responsible relation" to the unlawful failure to maintain sanitary warehouses. *Id.* at 673-76, 95 S.Ct. 1903; *see also United States v. Dotterweich,* 320 U.S. 277, 285, 64 S.Ct. 134, 88 L.Ed. 48 (1943).

But significantly, Park's only punishment was a fine; incarceration is a different matter. Commentators distinguish public welfare offenses from offenses for which the penalty involves imprisonment, and argue that *respondeat superior* is inappropriate for these "true crimes." Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another,* 43 Harv.L.Rev. 689, 717 (1930); *see also* Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* 255 (2d ed.1986); Rollin M. Perkins & Ronald N. Boyce, *Criminal Law,* 913-14 (3d ed.1982). We agree and hold that due process prohibits the state from imprisoning a person without proof of some form of personal blameworthiness more than a "responsible relation."

The upshot is this: criminal liability based on *respondeat superior* is acceptable if the defendant is in a "responsible relation" to the unlawful conduct or omission, but only if the penalty does not involve imprisonment. A defendant is in a "responsible relation" if he has the power to prevent violations from occurring. *See Park,* 421 U.S. at 670-73, 95 S.Ct. 1903. The owner liability provision makes imprisonment a possibility — indeed it is a certainty for the sixth and subsequent offenses. It is therefore unconstitutional at least to that extent.

We can salvage the fine, however, if the ordinance requires proof of a "responsible relation." Proof of a

defendant's position alone is not enough, *see id.* at 658, 95 S.Ct. 1903, but this provision requires more. Only acts "done within the scope of [a] servant, agent or employee's scope of authority under the owner" are imputable. Jacksonville, Fla. Adult Ent. & Serv.Code § 150.510(b). We understand this to mean that an owner-defendant is only responsible for acts or omissions that he has the power to prevent. For this reason, we leave intact the City's authority to fine owners for violations committed by their employees.

Personal blameworthiness can take two forms: unlawful act and unlawful intent. It is common to convict and imprison defendants for the acts of others — witness conspiracy law. But conspiracy still requires individualized proof of unlawful intent. The converse is strict liability, which requires proof of act but not intent. We decline to consider whether *mens rea* is an indispensable constitutional requirement for sending someone to prison. *Cf. Staples v. United States,* 511 U.S. 600, 616, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994) (penalty of imprisonment suggests that statute should not be construed as dispensing with *mens rea*). Instead, we hold that due process *at least* requires individualized proof of intent *or* act. The owner liability provision requires neither, so the City may not use it to incarcerate owners.

VI.

The last issue the plaintiffs raise concerns their entitlement to damages for 10 days they were closed after the City implemented the initial licensing and zoning provisions which the district court struck down. This claim is meritless. The district court correctly held that the plaintiffs are not entitled to damages.

For the foregoing reasons, we affirm the district court's judgment in part, reverse in part, dismiss in part, and remand this case for further proceedings consistent with this opinion.

AFFIRMED in part, REVERSED in part, DISMISSED in part, and REMANDED.

Appendix A

APPENDIX

Jacksonville, Fla. Code, Title VI, Chapter 150 (Adult Entertainment and Services Code — Businesses, Trades and Occupations)

150.103 Definitions. In this chapter, unless the context otherwise requires:

* * *

(c) *Adult entertainment establishment* means a commercial establishment where the owner, or an employee or agent of the owner, suffers, permits, allows, encourages, or pays any person to engage in nude entertainment on the premises. Adult entertainment establishment also includes any establishment which contains or operates an adult entertainment booth.

* * *

(k) *Principal stockholder* means an individual, partnership or corporation that owns or controls, legally or beneficially, ten percent or more of a corporation's capital stock and includes the officers, directors and principal stockholders of a corporation that is a principal stockholder under this chapter; provided, that if no stockholder of a corporation owns or controls, legally or beneficially, at least ten percent of the capital stock, all stockholders shall be considered principal stockholders; and further provided, that if a corporation is registered with the Securities and Exchange Commission or pursuant to Chapter 517, Florida Statutes

and its stock is for sale to the general public, it shall not be considered to have any principal stockholders.

* * *

150.205 License application; application fee.

(a) A person desiring to engage in the business of operating an adult bookstore, adult motion picture theater, adult entertainment establishment, or escort service shall file with the Sheriff a sworn application on forms supplied by the Sheriff. The application shall contain at least the following information and be accompanied by the following documents:

(1) If the applicant is:

(i) An individual, his name.

(ii) A partnership, the full name of the partnership and the name of the managing partner and the names of all other partners, whether general or limited, accompanied by the partnership instrument or a certified copy thereof.

(iii) A corporation, the exact corporate name and state of incorporation and the name of the chief executive officer and the names of all other officers, directors and principal stockholders, accompanied by the

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articles of incorporation and all amendments thereto and the certificate of incorporation, or certified copies thereof.

* * *

150.214 Issuance of license for prior revoked license.

When a license is revoked by the Sheriff, no license shall be issued for the location formerly covered by the revoked license. The period of time that a license shall be prohibited under this section shall be one year from the October 1 following revocation.

150.301 General requirements.

In addition to the special requirements contained in this part, unless otherwise exempted, each adult bookstore, adult motion picture theater and adult entertainment establishment, shall meet each of the requirements of this section.

* * *

(g) All premises shall have an entrance room or lobby, i.e., the room which is entered from the outside, and sanitary facilities as set forth in subsection (e). The entrance room or lobby may be as large or as small as the licensee chooses.

(h) All other rooms in premises must either:

(1) be not less than one thousand square feet in area; or

(2) be clearly marked in letters not less than two inches in height "No Customers or Patrons Allowed."

* * *

150.422 Hours of operation.

(a) Adult entertainment facilities, adult bookstores and adult movie theaters shall not be open between the hours of 2:00 a.m. and noon.

* * *

150.510 Owner responsibility.

(a) As used in part, *owner* shall mean and include the owner, and co-owner, partner, managing partner or chief executive officer.

(b) All acts of any servant, agent or employee, paid or unpaid, of an owner shall be imputed to the owner and be deemed to be an act of the owner if done within the scope of such servant, agent or employee's scope of authority under the owner.

(c) Any owner convicted of violating this chapter due to responsibility imposed pursuant to this section shall be upon conviction punished as follows:

(1) for the first five offenses, by a fine of not less than two hundred fifty dollars nor more than

five hundred dollars, or by imprisonment up to ten days in jail;

(2) for the sixth and subsequent offenses, by a fine of not less than three hundred fifty dollars nor more than five hundred dollars and by imprisonment of not less than twenty nor more than ninety days.

Jacksonville, Fla. Code, Section 656 (Zoning Code — Land Use)

656.131 Zoning exceptions

* * *

(c) With respect to acting upon applications for zoning exceptions:

(1) The Commission shall issue an order to grant the exception only if it finds from a preponderance of the evidence of record presented that the proposed use meets, to the extent applicable, the following standards and criteria:

(i) Will be consistent with the Comprehensive Plan, including any subsequent plan adopted by the Council pursuant thereto;

(ii) Will be compatible with the existing contiguous uses or zoning and

compatible with the general character of the area, considering population density, design, scale and orientation of structures to the area, property values, and existing similar uses or zoning;

(iii) Will not have an environmental impact inconsistent with the health, safety and welfare of the community;

(iv) Will not have a detrimental effect on vehicular or pedestrian traffic, or parking conditions, and will not result in the generation or creation of traffic inconsistent with the health, safety and welfare of the community;

(v) Will not have a detrimental effect on the future development of contiguous properties or the general area, according to the Comprehensive Plan, including any subsequent amendment to the plan adopted by the Council;

(vi) Will not result in the creation of objectionable or excessive noise, lights, vibrations, fumes, odors, dust or physical activities, taking into account existing uses or zoning in the vicinity;

(vii) Will not overburden existing public services and facilities;

(viii) Will be sufficiently accessible to permit entry onto the property by fire, police, rescue and other services; and

(ix) Will be consistent with the definition of a zoning exception, and will meet the standards and criteria of the zoning classification in which such use is proposed to be located, and all other requirements for such particular use set forth elsewhere in the Zoning Code, or otherwise adopted by the Planning Commission.

(2) In issuing its order to grant a zoning exception as provided in the Zoning Code, the Commission may place more restrictive requirements and conditions on applicants than are provided in the Zoning Code. A recommended order to grant a zoning exception shall not be granted unless and until the procedures in this chapter have been complied with.

(3) The use for which a zoning exception has been granted by the Commission shall not be commenced by the owner, his agent or lessee until such time as the order is deemed to be final or a final order has been issued and all of the improvements stipulated in the grant of exception necessary for the orderly use of the property have been accomplished.

(4) Unless a longer time is mutually agreed upon by the applicant and the Commission in the particular case, a public hearing shall be held by the Commission to consider an application for zoning exception within not more than sixty-three days from the date of filing of the completed application. Notice of the public hearing shall be made as provided in s. 656.136 and a party shall be heard in person or by agent or attorney.

(5) The violation of the terms of an exception, including conditions and safeguards which may be a part thereof, shall be deemed a violation of the Zoning Code and punishable as provided in the Zoning Code.

656.313 Community/General Commercial Category.

IV. *Commercial Community/General-2 (CCG-2) District.*

* * *

(c) *Permissible uses by exception.*

* * *

(7) Adult entertainment and service activities.

* * *

Appendix A

656.1101 Definitions. For the purposes of Part 11, the following definitions shall apply:

(a) *Adult entertainment or service facility* means an escort service, adult bookstore, nude massage parlor, adult motion picture theater or adult entertainment establishment, as defined in Chapter 150, Ordinance Code.

* * *

656.1103 Distance limitations; exception.

(a) No adult entertainment or service facility shall be located on a site unless the site equals or exceeds all of the distance limitations required by this subsection;

(1) One thousand feet from the boundary of another adult entertainment or services facility.

(2) Five hundred feet from the boundary of a residential district.

(3) One thousand feet from an established school or church.

(4) Five hundred feet from the boundary of any business which has an on premises consumption beverage license.

(b) Notwithstanding any ordinance to the contrary, and notwithstanding any prior legal status of any adult entertainment or services facility, as of March 1, 1995, no

adult entertainment or service facility shall be located on a site or parcel or in a structure which, in whole or in part, has been granted an on premises consumption beverage license or which is a bottle club.

(c) Notwithstanding any ordinance to the contrary, and notwithstanding any prior legal status of any adult entertainment or services facility, as of March 1, 1995, no adult entertainment or services facility shall be located on a site or parcel or in a structure which, in whole or in part, is within five hundred feet of the boundary of any business which has an on-premises consumption beverage license.

656.1109 Conditional commencement without exception

Where a person has applied for an exception in order to operate an adult entertainment [establishment] in a Community/Commercial General-2 zoning district, the applicant may begin operating the facility forty-five days after submitting a completed application. The conditional operation shall be permitted only until such time as the exception is granted or denied and judicial review is completed by a trial court of competent jurisdiction. This conditional grant to operate shall not permit the applicant to operate in violation of any other ordinance or law. In particular the applicant shall not operate in violation of any distance requirement set forth in this chapter.

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BARKETT, Circuit Judge, concurring in part and dissenting in part:

I agree with much of the majority's opinion in this case. However, I do not believe that Jacksonville's hours of operation provision can be upheld under the "time, place, and manner" analysis set forth in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).[1]

I agree that the hours of operation provision is a content-neutral restriction and that it serves the substantial

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1. I would also note that the *Renton* test, not the analysis set forth in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) and applied by a plurality in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), is the applicable standard. Unlike the ordinance at issue in *Renton* and the one before us in this case, *Barnes* dealt with a generally-applicable ban on public nudity, considering whether the ban on public nudity could be constitutionally applied to nude dancing in an adult entertainment establishment. Because we are considering a regulation that singles out adult entertainment establishments for regulation, rather than a generally-applicable statute that has an incidental effect on adult entertainment, *Renton*, not *Barnes*, provides the appropriate standard of review. We have previously recognized this distinction between *Renton* and *Barnes*. In *International Eateries of America, Inc. v. Broward County, Fla.*, 941 F.2d 1157 (11th Cir.1991), we upheld a county ordinance prohibiting adult nightclubs within 500 feet of a residential district and within 1,000 feet of a church. We pointed out that *Renton* and the case we were considering involved ordinances that only applied to adult entertainment, while *Barnes* involved a ban on all public nudity. Accordingly, we concluded that, even after *Barnes*, "*Renton* still controls our analysis." *Id.* at 1161.

governmental interest of eliminating the secondary effects produced by the late-night operations of adult entertainment establishments. Under *Renton,* however, this provision violates the First Amendment because it is not narrowly tailored to serve this substantial government interest. The ordinance requires the closure of adult entertainment establishments during early morning hours when the city concedes there are no secondary effects. *Renton*'s narrow tailoring requirement, however, requires a city to draw its ordinances "to affect only that category of theaters shown to produce the unwanted secondary effects. . . ." *Renton,* 475 U.S. at 52, 106 S.Ct. 925. By analogy, it seems to me that to justify closure, the city must limit its regulation to the hours where such secondary effects exist. Because the city has, without any justification at all, barred adult entertainment establishments from operating during the late morning hours with no indication of any secondary effects, the ordinance is "substantially broader than necessary," *Ward v. Rock Against Racism,* 491 U.S. 781, 800, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), and must be invalidated.[2] I believe that the

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2. Although the city could certainly mandate closure if it showed secondary effects during these late morning hours, it does not even purport to make such a showing and so this ordinance is distinguishable from the other ordinances which have been upheld against First Amendment challenges. *See Ben Rich Trading, Inc. v. City of Vineland,* 126 F.3d 155, 160-63 (3d Cir.1997) (upholding ban on operating adult entertainment establishments before 8:00 A.M. and after 10 P.M.); *Mitchell v. Commission on Adult Entertainment Establishments of Delaware,* 10 F.3d 123, 131-39 (3d Cir.1993) (upholding ban on operating adult entertainment establishments before 10:00 A.M. and after 10:00 P.M. and all day Sunday); *Star Satellite, Inc. v. City of Biloxi,* 779 F.2d 1074, 1079-

(Cont'd)

majority's assertion that the city needs no reason to force adult entertainment establishments to close during the late morning hours flies in the face of *Renton,* which makes clear that where a city regulates to avoid secondary effects, its regulation must be drawn "to affect only that category of theaters shown to produce the unwanted secondary effects. . . ." *Renton,* 475 U.S. at 52, 106 S.Ct. 925.

The majority offers no authority for its position. I believe that the Fifth Circuit's opinion in *Beckerman v. City of Tupelo, Miss.*, 664 F.2d 502 (5th Cir. Unit A Dec.1981), although not binding precedent, is directly on point and should guide our analysis. In *Beckerman,* the court invalidated a city ordinance forbidding parades after 6 P.M., finding the ban substantially broader than necessary to effectuate the city's interest in nighttime security. The court explained that because the sun did not set in Tupelo until well after 6 P.M. for a good part of the year, the ordinance "unnecessarily restricted [individuals] in the time in which they may parade." *Id.* at 512. Although the court recognized "the difficulty Tupelo faces in pinpointing the exact time at which the nighttime security problems arise," *id.*, it found the city's use of a 6 P.M. cutoff overbroad since nighttime security could not justify banning parades during the summer when the sun does not set until approximately 8:30 P.M. *Id.*

(Cont'd)

80 (5th Cir.1986) (upholding ban on operating adult entertainment establishments before 10:00 A.M. and after midnight and all day Sunday); *see also National Amusements, Inc. v. Town of Dedham,* 43 F.3d 731, 741-45 (1st Cir.1995) (upholding ban on operating entertainment business between 1:00 A.M. and 6:00 A.M.).

We face a similar situation here. Although a city may unquestionably regulate the hours of operation of an adult entertainment establishment to avoid the secondary effects associated with late night-hours, the city here, like the city in *Beckerman,* has done so in an overbroad manner by requiring closure during the late morning hours when no secondary effects have been shown to exist. The fact that the ordinance as a whole here serves to address the problem of late evening hours cannot save this ordinance any more than the fact that the ordinance in *Beckerman,* taken as a whole, addressed problems of nighttime security.

APPENDIX B

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION, DATED AUGUST 26, 1997

LADY J. LINGERIE, INC., etc., et al., Plaintiffs,

v.

CITY OF JACKSONVILLE, etc., Defendant (Two Cases).

Milton R. HOWARD, et al., Plaintiffs,

v.

CITY OF JACKSONVILLE, etc., Defendant.

Nos. 95-181-Civ-J-20A, 95-434-Civ-J-20A and 95-1005-Civ-J-20A.

United States District Court,
M.D. Florida,

Jacksonville Division

Aug. 26, 1997.

* * *

Appendix B

MEMORANDUM OPINION

SCHLESINGER, District Judge.

This is an action for declaratory and injunctive relief and damages challenging the constitutionality of city zoning ordinances placing certain restrictions on adult entertainment establishments. The stated purpose of the ordinances is to combat the undesirable secondary effects of nude dancing: prostitution, public masturbation, lewd and lascivious conduct, and sexual harassment. Most of the issues in this case can be resolved by the various motions for summary judgment/dismissal that have been filed in this case. The remaining factual issues were heard in a one-day trial in this cause held before the undersigned on July 31, 1997. For purposes of trial, the Court consolidated Case No. 95-1005-Civ-J-20A with the already consolidated case of 95-181-Civ-J-20A/25-434-Civ-J-20A. The Court first will resolve the issues submitted in the parties' dispositive motions. Then, based on the testimony and evidence received during trial, and the applicable legal standards, the Court will make findings of fact and conclusions of law on the remaining issues, as required by Rule 52(a) of the Federal Rules of Civil Procedure.

The motions presently before the Court are:

Case No. 95-181-Civ-J-20A/95-434-Civ-J-20A:

(1) Defendant's Motion for Judgment of Dismissal with Prejudice as to Plaintiffs Amy Watson and Michael Crowell (Doc. No. 56);

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(2) Defendant's Motion for Partial Summary Judgment as to Enactment Procedures for Challenged City Ordinances (Doc. No. 57) and Plaintiffs' Response thereto (Doc. No. 59);

(3) Plaintiffs' Motion for Partial Summary Judgment as to the Issue of Availability of Alternate Sites, Amortization, License Disclosures and Disparate Sentencing (Doc. No. 78) and Defendant's response thereto (Doc. No. 93);

(4) Defendant's Motion for Summary Judgment of Dismissal for Lack of Standing (Doc. No. 82) and Plaintiffs' response (Doc. No. 92);

(5) Defendant's Motion to Dismiss Plaintiff Gregory A. King for Lack of Standing (Doc. No. 84) and Plaintiffs' response (Doc. No. 91);

(6) Defendant's Motion for Summary Judgment (Doc. No. 85) and Plaintiffs' response (Doc. No. 90);

Case No. 95-1005-Civ-J-20A:

(7) Plaintiffs' Motion for Partial Summary Judgment as to the Issues of Procedural Safeguards for Zoning Exceptions, the Availability of Alternate Sites and Amortization (Doc. No. 20) and Defendants' response (Doc. No. 25); and

(8) Defendant's Motion for Summary Judgment (Doc. No. 26) and Plaintiffs' Response (Doc. No. 32).

Appendix B

I. BACKGROUND

On November 16, 1994, the City of Jacksonville enacted Ordinance 94-190-651 (Ordinance I). This Ordinance attempted to regulate adult bookstores,[1] adult entertainment establishments,[2] and adult motion picture theaters[3] within Jacksonville by requiring operators of such facilities to obtain a license from the Sheriff and to provide certain zoning, health, safety, and fire protection standards. Plaintiffs in this action are lingerie shops that contain non-obscene nude dancing (Plaintiffs also are referred to as "Lingerie Shops" or "Lingerie Shop" Plaintiffs). The Lingerie Shops are classified as adult entertainment establishments under the Ordinance. Following passage of the Ordinance, the Lingerie Shops closed their businesses. The Lingerie Shop Plaintiffs filed their Verified Petition (complaint) on February 28, 1995, seeking temporary and permanent injunctive relief, damages for violation of their civil rights, and a declaratory judgment declaring the Ordinance is void, invalid, and unconstitutional on several grounds. On March 10, 1995, this Court granted in part Plaintiffs' motion for preliminary injunction, enjoining Defendant and its agents, officers, employees, and persons acting under its direction and control from enforcing the licensing, suspension, and revocation provisions and zoning requirements found in Ordinance 94-190-651, since the Court found Sections 150.107, 150.207, 150.212, and 656.725 to be defective. *See* Preliminary

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1. Defined in Section 150.103(a).

2. Defined in Section 150.103(c).

3. Defined in Section 150.103(f).

Injunction Order (Doc. No. 18 in Case No. 95-181-Civ-J-20). This injunction did not affect any other Ordinance or other portions of Ordinance 94-190-651 except for those sections expressly enjoined. On March 28, 1995, the City of Jacksonville adopted a subsequent ordinance, Ordinance 95-307-109 (Ordinance II), which partially amended Ordinance I and adopted new and modified provisions. The Lingerie Shop Plaintiffs filed a second complaint and sought to preliminarily enjoin Ordinance II (Doc. No. 3 in Case No. 95-434-Civ-J-20) as well as Ordinance I. After reviewing the new Ordinance, this Court denied the Lingerie Shops' motion for preliminary injunction of Ordinance II and dissolved the preliminary injunction of Ordinance I. The Court also consolidated the two cases. Doc. No. 32 in Case No. 95-181-Civ-J-20; Doc. No. 23 in Case No. 95-434-Civ-J-20. On June 19, 1996, this Court granted in part Defendant's motion for partial summary judgment and dismissed certain of the Lingerie Shop Plaintiffs' claims.[4]

Plaintiff Milton R. Howard and Emro Corporation, d/b/a J.R.'s Lounge (J.R.'s), filed its Petition for Injunctive Relief, Declaratory Judgment and Damages on October 11, 1996, challenging the constitutionality of the Ordinances. Plaintiff's business, J.R.'s Lounge provides nude entertainment by live dancers, and also is classified as an

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4. The Court dismissed Plaintiffs' claims regarding the following provisions of Ordinance 94-190-651: Sections 50.107, 150.222, 150.303, 150.304(d), 150.403, 150.407, and 150.501(a)(3); Plaintiffs' challenge under the Florida Constitution to privacy rights of patrons and performers/models in Sections 150.222, 150.301(*o*), 150.301(p), 150.303(3), and 150.303; and Plaintiffs' claims under Fla. Stat. § 383.015 and Chapter 800. *See* Doc. No. 60.

adult business according to the Ordinances. J.R.'s is located in a CCG-2 zone, an area of the City that requires a special zoning exception in order to allow nude dancing on the premises. According to the complaint, J.R.'s applied for the zoning exception in December 1, 1994, which was initially granted by the Jacksonville Planning Commission on March 2, 1995. However, on May 23, 1995, the zoning exception was revoked by the City Council, and this lawsuit ensued.

II. DISPOSITIVE MOTIONS

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of showing the Court, by reference to materials on file that there are no genuine issues of material fact that should be decided at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Clark v. Coats & Clark, Inc.,* 929 F.2d 604 (11th Cir.1991). A moving party discharges its burden on a motion for summary judgment by "showing" or "pointing out" to the Court there is an absence of evidence to support the non-moving party's case. *Celotex,* 477 U.S. at 325, 106 S.Ct. at 2553-54. Rule 56 permits the moving party to discharge its burden with or without supporting affidavits and to move for summary judgment on the case as a whole or on any claim. *Id.* When a moving party has discharged its burden, the nonmoving party must then "go beyond the pleadings," and by its own affidavits, or by "depositions, answers to interrogatories, and admissions on

file," designate specific facts showing that there is a genuine issue for trial. *Id.* at 324, 106 S.Ct. at 2553.

In determining whether the moving party has met its burden of establishing there is no genuine issue as to any material fact and it is entitled to judgment as a matter of law, the Court must draw inferences from the evidence in the light most favorable to the nonmovant, *Key West Harbour Development Corp. v. City of Key West,* 987 F.2d 723, 726 (11th Cir.1993), and resolve all reasonable doubts in that party's favor. *Spence v. Zimmerman,* 873 F.2d 256, 257 (11th Cir.1989). The nonmovant need not be given the benefit of every inference, but only of every "reasonable" inference. *Brown v. City of Clewiston,* 848 F.2d 1534, 1540 n. 12 (11th Cir.1988). The Eleventh Circuit has explained the reasonableness standard:

> In deciding whether an inference is reasonable, the Court must "cull the universe of possible inferences from the facts established by weighing each against the abstract standard of reasonableness." [citation omitted]. The opposing party's inferences need not be more probable than those inferences in favor of the movant to create a factual dispute, so long as they reasonably may be drawn from the facts. When more than one inference reasonably can be drawn, it is for the trier of fact to determine the proper one.

WSB-TV v. Lee, 842 F.2d 1266, 1270 (11th Cir.1988).

Thus, if a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if

that inference introduces a genuine issue of material fact, then the court should not grant the summary judgment motion. *Augusta Iron and Steel Works v. Employers Insurance of Wausau,* 835 F.2d 855, 856 (11th Cir.1988). It must be emphasized that the mere existence of *some* alleged factual dispute will not defeat an otherwise properly supported summary judgement motion. Rather, "the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A dispute about a material fact is "genuine" if the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248, 106 S.Ct. at 2510. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52, 106 S.Ct. at 2511-12.

A. Lady Lingerie Plaintiffs

(1) Dismissal of Plaintiffs Amy Watson and Michael Crowell

Defendant filed two separate motions for Judgment of Dismissal with Prejudice as to Plaintiffs Amy Watson and Michael Crowell (Doc. Nos. 47 & 56), to which the Court ordered consolidated and directed Plaintiffs, who are appearing *pro se,* to file responses (Doc. No. 60). The Court informed Plaintiffs:

> the disposition of the consolidated motion for judgment of dismissal (Doc. Nos. 47 and 56) may

> result in the dismissal of their case with prejudice without any further proceedings. It would be in the best interest of Plaintiffs to respond to the consolidated motion within **ten (10) days** of the date of this Order.

No response was filed by either Plaintiff. Accordingly, Defendant's Motion for Judgment of Dismissal with Prejudice as to Plaintiffs Amy Watson and Michael Crowell (Doc. No. 56) is **GRANTED.** This action as to Plaintiffs Amy Watson and Michael Crowell is hereby **DISMISSED WITH PREJUDICE**. *See* Local Rule 3.10.

(2) Enactment Procedures/Due Process Claim

Defendant moves for partial summary judgment on Plaintiffs' complaint with respect to Plaintiff's allegation that the City did not follow the procedural requirements set forth in Florida Statutes, § 166.041(3)(c), in the enactment of the two Ordinances.

It is undisputed that the two Ordinances, 94-190-651 and 95-307-109, were not enacted in strict accordance with the procedures set forth in Fla. Stat. § 166.041(3)(c)2. Ordinance 94-190-651 was advertised 14 days in advance of the public hearing, rather than the 5 days specified by section 166.041(3)(c)(2). Ordinance 95-307-109 was enacted as an emergency ordinance and did not comply with any of the requirements of § 166.041(3)(c)(2).

Under Florida law, strict compliance with the notice requirements of the state statute is a jurisdictional and

mandatory prerequisite to the valid enactment of a zoning measure. *Ellison v. City of Fort Lauderdale,* 183 So.2d 193 (Fla.1966). Ordinances which do not comply with the notice requirements are void. *Daytona Leisure Corp. v. Daytona Beach,* 539 So.2d 597, 599 (Fla.App.1989). However, § 166.041(3)(c)(2) applies only to ordinances which substantially affect the use of land. *T.J.R. Holding Co. v. Alachua County,* 617 So.2d 798 (Fla.App.1993). In *T.J.R.*, the ordinance regulated only conduct, prohibiting nudity and sexual conduct in establishments that served alcohol. The Florida court concluded that the ordinance did not affect the owner's use of the land and so it did not have to comply with the formalities required for a land-use ordinance. On the other hand, *Daytona Leisure* involved a "classic zoning ordinance," which prohibited the sale of alcohol in designated areas. *Id., cited in 3299 N. Federal Highway, Inc. v. Board of County Commissioners of Broward County,* 646 So.2d 215, 222 (Fla.App.1994). The court concluded that the failure to properly notice the ordinance prior to adoption rendered it unenforceable.

Somewhere "in the middle" of the above cases is the ordinance in *3299 N. Federal Highway,* which regulates both conduct and the use of land. In that case, two adult night clubs which featured nude dancing and three dancers from one of the clubs filed an action against Broward County to enjoin it from enforcing its newly adopted "Broward Adult Entertainment Code." One of the issues was whether the county was required to comply with the notice and public hearing requirements under Florida law. The trial court held that because the law was not a zoning or land-use ordinance, it was not subject to those requirements. The Florida district

court noted that the ordinance regulated activities that "are quite clearly 'conduct' — touching, lap dancing, distances between performers and patrons — [but that] it also requires that affected businesses meet structural requirements — partitions, width of doorways, distance between seats and stage, etc." *Id.* The court analyzed the legislative history of the notice/hearing statute, which is found "merely persuasive rather than controlling," and concluded that the structural requirements of the ordinance do not substantially affect use of the land, and therefore would not be subject to strict enactment requirements. *Id.* at 223.

Ordinances that set minimum distance requirements or change setback and height restrictions have been found to "substantially affect land use." *Daytona Beach,* 539 So.2d at 597 (minimum distance between business selling alcohol and residential area); *City of Miami Beach v. State,* 108 So.2d 614 (Fla. 3d DCA 1959) (changing setback and height restrictions on new buildings). The City does not contest that certain portions of the Ordinances in this case substantially affect the use of land, such as the setback requirements and minimum distance requirements between adult entertainment businesses and churches, schools, and other adult businesses. *See e.g.,* Ordinance 94-190-651, § 656.1103(a)(1)-(4). However, the City argues that the provisions of the Ordinances that clearly affect conduct and interior structural requirements do not have to be in compliance with the notice and hearing requirements of section 166.041(3)(c)(2).

As an initial matter, the Court rejects Defendant's argument that Plaintiffs do not have standing to challenge

the enactment procedures. Any "affected resident, citizen or property owner" may challenge an ordinance as void because it is not enacted in accordance with law. *Renard v. Dade County,* 261 So.2d 832, 838 (Fla.1972). "Anyone against whom the void ordinance is asserted is affected." *Bhoola v. City of St. Augustine Beach,* 588 So.2d 666, 667 (Fla.App.1991).

Nonetheless, the Court finds that the enactment procedures as to Ordinance 94-190-651 were complied with. The only potential defect Plaintiffs point to — advertising the second public hearing 14 days in advance of the hearing, rather than the 5 days specified in section 166.041(3)(c)(2) — does not render the Ordinance void for failure to comply with the notice provisions of the statute. The undisputed evidence demonstrates that the City complied with each of the *minimum* requirements of section 166.041(3)(c)(2). *See* Exhibit A to the City's Memorandum in Support of its Motion for Partial Summary Judgment as to Enactment Procedures (Doc. No. 58). Section 166.041(8) provides that "[t]he notice procedures required by this section are established as *minimum* notice procedures." *Id.* (emphasis added). The statute does not require exactness as to the number of days. The five day requirement is a minimum requirement. Plaintiffs have cited to and the Court has found no cases which indicate that extra notice violates the statute. Therefore, the Court finds that the fourteen days notice complies with the requirements of § 166.041(3)(c)(2), and Defendant's Motion for Partial Summary Judgment as to Enactment Procedures of Ordinance 94-190-651 is **GRANTED.**

The Court also agrees that only the portions of Ordinance 95-307-109 that "substantially affects the use of the land" have to comply with the § 166.041(3)(c)(2) notice and hearing requirements. Ordinance 95-307-109 repealed section 656.725, regarding amortization of adult entertainment facilities, and created section 656.1109, which allows conditional commencement of a facility prior to obtaining an exception. Section 656.725 previously was enjoined by this Court. *See* Order Granting Preliminary Injunction, Doc. No. 18 in Case No. 95-181-Civ-J-20. Therefore, the Court agrees with Defendant that the City was not required to comply with the notice requirements for an enjoined ordinance. In addition, Plaintiffs have not demonstrated that they were *injured* by the *repeal* of an ordinance which they claimed in another lawsuit violates their constitutional rights. Consequently, they do not have standing to challenge the enactment of section 656.725. Moreover, section 656.1109, which guarantees the right to operate a facility while awaiting a decision on an application for an exception, is not an ordinance which substantially affects the use of land. Thus, the City did not have to comply with the notice requirements of § 166.041(3)(c)(2).

Finally, the Court rejects Plaintiffs' contention that Defendant's failure to follow enactment procedures, if any, is a violation of procedural due process. Failure to follow state procedures is not in and of itself a violation of the federal Constitution. *Harris v. Birmingham Board of Education,* 817 F.2d 1525, 1527 (11th Cir.1987). In *Harris,* the Eleventh Circuit rejected Harris' claim that his procedural due process rights were violated when the Board of Education failed to follow state procedures regarding notice. The court stated:

> Even if the notice in this case is insufficient to satisfy the state statute, the state statute does not define the process under the federal Constitution. Therefore, even if the state statute has been violated, that does not prove a violation of a federal constitutional rights. . . . Although the state statutory notice requirement is stated in mandatory language, it is a purely procedural requirement and *not a substantive predicate to termination which gives Harris a protected liberty or property interest in receiving notice.* . . .

Id. (emphasis supplied). In this case, for the reasons discussed herein, the City did not violate federal due process in its enactment of either ordinance. Accordingly, Plaintiffs' request for declaratory and injunctive relief on its due process claim is **DENIED;** and Defendant's Motion for Partial Summary Judgment as to Enactment Procedures of Ordinances 94-190-651 and 95-307-109 is **GRANTED.**

(3) Lack of Standing

Most of the arguments raised in Defendant's Motion for Summary Judgment of Dismissal for Lack of Standing (Doc. No. 82) previously have been considered and rejected by this Court. *See* Order of July 13, 1995 in Case No. 96-434-Civ-J-20 (denying Defendant's Motion to Dismiss for Lack of Standing) and Doc. No. 5 in same case (Defendant's Motion); Order of June 19, 1996 in consolidated case (denying Defendant's Defendant's Motion for Summary Judgment as to Constitutionality of Cumulative Effect of Challenged Ordinance (Doc. No. 48)). The remaining

arguments propounded by Defendant are without merit. Accordingly, Defendant's Motion for Summary Judgment of Dismissal for Lack of Standing (Doc. No. 82) is **DENIED.**

(4) Dismissal of Plaintiff Gregory A. King for Lack of Standing

In light of Plaintiffs' filing its First Amended Complaint on April 14, 1997 (Doc. No 102) adding as Plaintiffs the two corporations which actually own the lingerie businesses in question and in which Plaintiff Gregory King holds stock, and further defining King's interest in the businesses, which was consented to by Defendant, Defendant's Motion to Dismiss Plaintiff Gregory A. King for Lack of Standing (Doc. No. 84) is **MOOT.**

(5) Nudity as a Sales Promotion

The City moves for summary judgment contending that nudity, used as a sales promotion, is commercial speech and therefore is not protected by the First Amendment, citing *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995). That case involved lawyer advertising, which is considered "pure commercial advertising." *Id.* at 634-35, 115 S.Ct. at 2381. The Court noted that commercial speech enjoys a limited measure of protection under the First Amendment, and analyzed the case under the "intermediate scrutiny" standard. *Id.* Defendant argues that the nude dancing at Plaintiffs' facilities was being used to market Plaintiffs' lingerie. Therefore, the argument goes, it was outside the protection of the First Amendment. Plaintiffs respond that Defendant has misstated the facts "in

an attempt to downplay the First Amendment expressive nature of the entertainment provided." Response at 2 (Doc. No. 90).

The evidence supports Plaintiffs' contention. Although Plaintiffs testified that the performers did not engage in a typical cabaret performance, i.e., "nude dancing in what the industry considers nude dancing, which is stages, flashing lights, and very loud music and the absence of lingerie [where the performers] stand . . . on the stage nude," the testimony was that models were engaged in a type of expressive performance akin to a more traditional striptease. Deposition of Gregory King at 77-78. This Court previously has noted that "nude dancing is expressive conduct entitled to some degree of First Amendment protection . . . . [if only] 'within the outer perimeter of the First Amendment.' " Order of June 19, 1996, granting in part and denying in part motions for summary judgment (Doc. No. 48 at 9) (1996 Summary Judgment Order) (citing *Redner v. Dean,* 29 F.3d 1495, 1499 (11th Cir.1994), *cert. denied,* 514 U.S. 1066, 115 S.Ct. 1697, 131 L.Ed.2d 560 (1995); *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991)). Therefore, the City's Motion for Summary Judgment (Doc. No. 85) is **DENIED.**

(6) Remaining Renton Factors

In the its 1996 Summary Judgment Order, the Court found that the Ordinances in question satisfied the first two prongs of the test established in *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), in that the Ordinances were (1) "content-neutral"

time, place and manner regulations, which (2) serve the substantial governmental interest of combating the undesirable secondary effects of nude dancing: in this case, restricting or regulating prostitution, public masturbation, sexual harassment or discrimination. *See* 1996 Summary Judgment Order at 10-11; *Renton,* 475 U.S. at 48, 106 S.Ct. at 929; *FW/PBS v. City of Dallas,* 493 U.S. 215, 222, 236, 110 S.Ct. 596, 602-03, 610, 107 L.Ed.2d 603 (1990); *TK's Video, Inc. v. Denton County, Texas,* 24 F.3d 705, 707 (5th Cir.1994). In addition to serving a substantial government interest, the regulation in question must allow for reasonable alternative avenues of communication and must be narrowly tailored to serve the government interest at issue. *Renton,* 475 U.S. at 50, 106 S.Ct. at 930; *International Eateries of America, Inc. v. Broward County,* 941 F.2d 1157, 1162 (11th Cir.1991), *cert. denied,* 503 U.S. 920, 112 S.Ct. 1294, 117 L.Ed.2d 517 (1992).

a. Reasonable Alternative Avenues of Communication

In its previous Summary Judgment Order (Doc. No. 48), the Court denied summary judgment because there was a factual issue remaining whether the Ordinance will allow reasonable alternative avenues of communication as Plaintiffs' expert had not completed his study of available sites in the City. Order at 15. The Court is required to make findings of fact with respect to the actual number of potential sites available for adult businesses, and whether that number will allow reasonable alternative avenues of communication to withstand constitutional scrutiny. *See Renton, supra; International Eateries,* 941 F.2d at 1165, citing *Walnut*

Properties, Inc. v. City of Whittier, 861 F.2d 1102, 1108-09 (9th Cir.1988), *cert. denied,* 490 U.S. 1006, 109 S.Ct. 1641, 104 L.Ed.2d 157 (1989).

Since that time, both Plaintiffs and Defendant have presented expert testimony in the form of affidavits concerning studies of available sites.[5] The City of Jacksonville permits adult uses as a matter of right in the CCBD (Commercial, Central Business District) zone and as a special exception in the CCG-2 (Commercial, Community/ General, 2) zoning district. City of Jacksonville Zoning Code, § 656.1102. In addition, in either zone, adult businesses must meet the set-back requirements of section 656.1103, which precludes the location of an adult business:

> (1) within 500 feet from residences;
>
> (2) within 1,000 feet from schools, churches and other adult uses; and
>
> (3) within 500 feet from bars.

Section 656.1103(a)(1)-(4) (distance requirements).

The parties agree that there are two (2) potential sites available in the CCBD zone that would accommodate Plaintiffs' businesses and comply with the distance requirements of the zoning Ordinances. *See* Affidavit of Thad

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5. Additional evidence on the issue also was presented at the July 31, 1997, bench trial, specifically as the issue related to the 1000 square feet room requirement of the Ordinance. The Court will discuss that evidence later in this Opinion.

Crowe (Crowe Affidavit), Doc. No. 94 at 5 (finding that there are two parcels of 140 in the district where adult uses would allowed "by right" — i.e., where the distance requirements do not affect the parcels, which is 1.4% of all CCBD parcels); Affidavit of Robert Bruce McLaughlin (McLaughlin Affidavit), Doc. No. 80 at 13.

However, the parties disagree on the number of potential sites available in the CCG-2 zone, which requires adult entertainment establishments to obtain a special use permit. Defendant's expert averred that within the City of Jacksonville[6] "a survey of 734 CCG-2 zoned parcels outside of the CCBD area revealed that 93 were not affected by the adult use distance requirements. This represents 12.7% of all CCG-2 zoned parcels." Crowe Affidavit at 6. Plaintiffs' expert, however, did not undertake the "detailed research" in the CCG-2 zone as he did in the CCBD zone, which he only "spot checked." McLaughlin Affidavit at 8. The reason McLaughlin gave for performing only a spot-check in the CCG-2 zone is that he was of the opinion that the special use permit in the CCG-2 zones had the "demonstrable effect" of precluding adult uses in those zones. *Id.* at 7. McLaughlin arrived at this conclusion for the following reasons: (1) all except one of the adult entertainment establishments that previously operated in the CCG-2 zones were forced to close as a result of the Ordinances; (2) one ongoing adult business located in the CCG-2 zone, J.R.'s, applied for and was denied a special exception; (3) given that the initial approval of the

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6. The Court rejects Defendant's argument that the Court can consider municipalities outside the Jacksonville/Duval County area. *See Centerfold Club, Inc. v. City of St. Petersburg*, 969 F.Supp. 1288, 1306-07 (M.D.Fla.1997).

special exception for J.R.'s by the governmental agency, the Jacksonville Planning Commission, and the subsequent denial of the permit by the "political body," the Jacksonville City Commission, "it is reasonable to conclude that special exceptions for adult businesses are disfavored by the City Commission and will not be granted as a matter of course;" (4) adult businesses will avoid locating in zones which require special exception approval by a government body; and (5) as a practical matter, the application of the Ordinances have precluded the opening of other adult businesses in the CCG-2 zone. *Id.* at 7-8.

Plaintiffs do not appear to contend that a total of 95 potentially available sites (2 in the CCBD area plus 93 in the CCG-2 zone) would not pass constitutional muster under *Renton* and *International Eateries*. After reviewing the relevant case law, the Court finds as a matter of law that 95 sites allow Plaintiffs "reasonable avenues of alternative communication" under *Renton*. The Court makes no determination of what the "minimum" number of sites would be in order to pass constitutional scrutiny, because the Court need not reach that issue today. In the case at hand, 95 sites is more than adequate to pass constitutional muster. *See International Eateries,* 941 F.2d at 1165 (twenty-six sites allowed for reasonable alternative avenues of communication); *International Food & Beverage Systems v. City of Fort Lauderdale,* 794 F.2d 1520, 1526 (11th Cir.1986) (twenty-two sites adequate), *aff'd,* 838 F.2d 1220 (11th Cir.1988); *T-Marc, Inc. v. Pinellas County,* 804 F.Supp. 1500, 1504 (M.D.Fla.1992) (noting that 123 available sites were far more than the number that several courts have held are adequate); *Southern Entertainment Co. of Fla., Inc. v.*

City of Boynton Beach, 736 F.Supp. 1094, 1101 (S.D.Fla.1990) (eleven locations sufficient); *Function Junction, Inc. v. City of Daytona Beach,* 705 F.Supp. 544, 552 (M.D.Fla.1988) (twelve sites adequate). *Cf. Centerfold Club, Inc. v. City of St. Petersburg,* 969 F.Supp. 1288, 1304-05 (M.D.Fla.1997) (finding nineteen sites inadequate, which is a ratio of one site per 12,565 persons).[7]

Plaintiffs argue, however, that the availability of sites in the CCG-2 zone by special exception is illusory, because of the unbridled authority granted the decision maker. Therefore, Plaintiffs contend that there are only two sites in the entire City of Jacksonville on which they can locate the fifteen businesses that previously operated prior to enactment of the Ordinances, and any future such businesses.

There is no question that if only two sites were available for adult use in a city the size of Jacksonville, it would be insufficient to meet the requirements of *Renton*. Defendants do not dispute that contention, but argue that an additional 93 sites are available in the CCG-2 zone. It is also axiomatic

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7. The Court disagrees with the methodology advanced by Plaintiff's expert, which the Court notes is the same expert in this case, and accepted by the court in *Centerfold Club,* equating the number of sites to the population. In the cases cited therein, those courts did not consider the ratio of population to number of potential sites when the issues were decided, therefore, no "minimum" ratio was decided by those courts that would pass constitutional muster. Also, in *Centerfold Club,* the ratio in that case appeared to be considerably lower than in the other cases. In this case, the number of sites is considerably ***higher*** than those approved by other courts. Therefore, that case is distinguishable from the instant case, and the Court does not find its authority to be persuasive.

that if a conditional use ordinance grants the governmental body unbridled discretion, it will be held unconstitutional. *Shuttlesworth v. Birmingham,* 394 U.S. 147, 150, 89 S.Ct. 935, 938, 22 L.Ed.2d 162 (1969) (noting that "many decisions of this Court over the last 30 years [have held that] a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional"). Therefore, the Court must examine the special use exception in this case and determine whether it grants the City "unbridled and absolute power," as the *Shuttlesworth* Court found in the ordinance in question. *Id.*

Section 656.131(c), Jacksonville Code, provides:

> (1) The Commission shall issue an order to grant the exception only if it finds from a preponderance of the evidence of record presented that the proposed use meets, to the extent applicable, the following standards and criteria:
>
> (i) Will be consistent with the Comprehensive Plan, including any subsequent plan adopted by the Council pursuant thereto;
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> (ii) Will be compatible with the existing contiguous uses or zoning and compatible with the general character of the area, considering population density, design, scale and orientation of structures to the area, property values, and existing similar uses or zoning;

(iii) Will not have an environmental impact inconsistent with the health safety and welfare of the community;

(iv) Will not have a detrimental effect on vehicular or pedestrian traffic, or parking conditions, and will not result in the generation or creation of traffic inconsistent with the health, safety and welfare of the community;

(v) Will not have a detrimental effect on the future development of contiguous properties or the general area, according to the Comprehensive Plan, including any subsequent amendment to the plan adopted by the Council;

(vi) Will not result in the creation of objectionable or excessive noise, lights, vibrations, fumes, odors, dust or physical activities taking into account existing uses or zoning in the vicinity;

(vii) Will not overburden existing public services and facilities;

(viii) Will be sufficiently accessible to permit entry onto the property by fire, police, rescue and other services; and

(ix) Will be consistent with the definition of a zoning exception, and will meet the standards and criteria of the zoning classification in which

> such use is proposed to be located, and all other requirements for such particular use set forth elsewhere in the Zoning Code, or otherwise adopted by the Planning Commission.
>
> (2) In issuing its order to grant a zoning exception as provided in the Zoning Code, the Commission may place more restrictive requirements and conditions on applications than are provided in the Zoning Code. . . .

Id. Exhibit "D" to Petition for Injunctive Relief, Declaratory Judgment and Damages, Doc. No. 1 in Case No. 95-1005-Civ-J-20.

Plaintiffs contend that this same language has been declared unconstitutional in every challenge brought against comparable legislation. The Court has carefully reviewed the cases cited by Plaintiffs and finds most of those cases to be distinguishable on the facts. In *Shuttlesworth,* the Supreme Court struck down as unconstitutional an ordinance making it an offense to participate in any parade or procession or other public demonstration" without first obtaining a permit from the City Commission. The ordinance provided that the government official could refuse to issue the permit if the proposed use threatened "the public welfare, peace, safety, health, decency, good order, morals, or convenience" of the community. The Court held that the ordinance vested "virtually unbridled and absolute power" in the City Commission. Similarly, in *3570 East Foothill Blvd., Inc. v. City of Pasadena,* 912 F.Supp. 1268, 1275-76 (C.D.Cal.1996), the court struck down conditional use permit

ordinances which allowed for the sale of alcohol and the provision of arcade games, billiards, and shuffleboard as part of a restaurant use. The city could deny a permit if the proposed use would be "detrimental to the public health, safety, or welfare of persons residing or working adjacent to the neighborhood of such use, or injurious to properties or improvements in the vicinity." The court noted that the language was "almost identical to the language struck down as unconstitutional in *Shuttlesworth,*" and in another California district court case, *Dease v. City of Anaheim,* 826 F.Supp. 336 (C.D.Cal.1993), and invalidated the ordinances as unconstitutional prior restraints on speech. *Id.* In each of those cases, the language concerning the health and welfare of the community was not tied to anything in particular. In contrast, the language of the special exception in this case requires that the zoning use "[w]ill not have an *environmental impact* inconsistent with the health, safety and welfare of the community. . . ." § 656.131(c)(1)(iii) (emphasis supplied). Such language is specifically tied to the environment and therefore does not suffer from the vagueness and potential for misuse that the courts in the other cases faced.

Plaintiffs also cite the case of *Santa Fe Springs Realty Corp. v. City of Westminster,* 906 F.Supp. 1341, 1367 (C.D.Cal.1995), which declared invalid a requirement that the proposed use be consistent with the City Comprehensive Plan. In that case, however, unlike the case at hand, at the time the lawsuit was bought the Comprehensive Plan did not exist. In this case, the City has an existing plan. Requiring the use to be consistent with an existing plan is not problematic. *See* § 656.131(c)(1)(i). There exists "definite

and objective standards" by which the City can make its decision whether to grant a special exception. *Cf. Dease,* 826 F.Supp. at 344.

It is well settled that the government may legitimately exercise its police powers to advance its aesthetic interests. *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 805, 104 S.Ct. 2118, 2129, 80 L.Ed.2d 772 (1984). Both traffic safety and aesthetics are substantial governmental goals. *See id.* at 811, n. 28, 104 S.Ct. at 2132, n. 28. Therefore, the City's requirements, for example, that the use be "compatible with the existing contiguous uses or zoning and compatible with the general character of the area, considering population density, design scale and orientation of structures to the area," § 656.131(c)(1)(ii), and that the uses will not have a "detrimental effect on vehicular or pedestrian traffic . . .", § 656.131(c)(1)(iv), are valid governmental interests and do not vest the City with unbridled discretion. Likewise, most of the other criteria in § 656.131(c) set forth permissible bases for land use restrictions. *See e.g., Greenbriar, Ltd. v. City of Alabaster,* 881 F.2d 1570, 1580 & n. 20 (concern about effect of proposed development on traffic, on congestion, on surrounding property values, on demand for city services and on other aspects of the general welfare are permissible bases for land use restrictions); *Grosz v. City of Miami Beach,* 721 F.2d 729, 738 (11th Cir.1983) (recognizing zoning interests of reduced traffic, noise, and litter), *cert. denied,* 469 U.S. 827, 105 S.Ct. 108, 83 L.Ed.2d 52 (1984).

With only one exception, the Court finds as a matter of law that each of the provisions in § 656.131(c) pass

constitutional scrutiny. The exception is § 656.131(c)(2), which provides:

> In issuing its order to grant a zoning exception as provided in the Zoning Code, the Commission may place more restrictive requirements and conditions on applications than are provided in the Zoning Code. . . .

The Court finds that provision, which allows the Commission to place "more restrictive requirements and conditions on applications" than are provided in the Zoning Code does not provide the required "narrow, objective and definite standards to guide the licensing authority," and, on the contrary, grants the Commission "unbridled discretion" to make decisions on any basis at all, including an impermissible basis, such as content-based regulation of speech. *See Shuttlesworth,* 394 U.S. at 150-51, 89 S.Ct. at 938-39; *Dease,* 826 F.Supp. at 343-44. Therefore, the Court must determine whether the unconstitutional provision can be severed from the ordinances, or, whether the entire adult business regulation scheme must be invalidated.

"The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law." *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 684, 107 S.Ct. 1476, 1480, 94 L.Ed.2d 661 (1987); *3570 Foothill Blvd,* 912 F.Supp. at 1280-82. In this case, is it clear that without § 656.131(c)(2), the adult use

ordinance is "fully operative." Accordingly, severing the offensive provision, the Court finds that a total of 95 sites are potentially available, which allow Plaintiffs reasonable avenues of communication under *Renton*. However, Plaintiff's Motion for Partial Summary Judgment on the issue of availability of alternate sites is **GRANTED IN PART,** in that the Court declares § 656.131(c)(2) of the Jacksonville City Code to be unconstitutional, and will sever that provision from the Ordinance.

b. Narrowly Tailored to Further City's Interest

Having found that the City's zoning Ordinances further the City's interest in combating the undesirable secondary effects of adult entertainment establishments, the Court must next address whether the Ordinances are narrowly tailored to further that interest. In a similar case upholding distance ordinances, the Eleventh Circuit held that "[s]o long as the distance requirements are not greater than necessary to prevent the secondary effects, they are narrowly tailored to serve their purpose." *International Eateries,* 941 F.2d at 1163. In that case, similar to the instant cases, the ordinances prohibited location of an adult nightclub within 500 feet of a residentially zoned district or 1000 feet of a church. Noting that the distances required by the ordinances were no farther than those approved by the Court in *Renton,* the court held the ordinances were narrowly tailored to serve their purpose of combating the secondary effects of adult entertainment establishments. *Id.* at 1165. In this case, as in *International Eateries* and *Renton,* the Ordinance prohibits adult businesses from locating within 500 feet of residences, within

1,000 feet from schools, churches and other adult uses, and within 500 feet from bars. The Court finds those distances, which are no greater than those approved by the courts in *Renton* and *International Eateries,* and serve the substantial government interest of combating the secondary effects of nude entertainment, are narrowly tailored to achieve that objective.

(7) Amortization Period

Plaintiffs move for partial summary judgment for the failure of the revised Ordinance to provide a reasonable amortization period. The first of the two Ordinances provided for an amortization period of approximately four months before the zoning requirements of the Ordinance were to go into effect. Ord. 94-190-651 § 656.725. However, the Court declared the licensing and zoning provisions of the original Ordinance unconstitutional. Thereafter, the City enacted a new Ordinance which expressly repealed the four-month amortization period in the original Ordinance. Plaintiffs contend "the new Ordinance forced each of these Plaintiffs to close their businesses." Motion at 17.

The newly enacted Ordinance 95-307-109 lacks either "grandfathering" allowances or a reasonable amortization period. Therefore, the amended Ordinance demanded immediate compliance with the zoning and physical requirements of the law, forcing Plaintiffs to close their businesses. The City's deprivation of Plaintiffs' property without allowing Plaintiffs a reasonable opportunity to recover their investment or relocate is unreasonable. *See Ebel v. City of Corona,* 767 F.2d 635, 639 (9th Cir.1985); *T-Marc,*

804 F.Supp. at 1504 (amortization period must be reasonable).

However, because Plaintiffs operated their businesses between the time the Court declared the original Ordinance unconstitutional and until the new Ordinance was enacted, Plaintiffs suffered no "taking" of property for which they are entitled to compensation, unless the Court declares the new Ordinance to be unconstitutional.

Furthermore, since the parties have briefed the Court on this issue, the City created a new Section 656.725(a), in Ordinance 95-413-300, which provides alternate amortization periods. That section provides, in part:

> Notwithstanding any ordinance to the contrary, and notwithstanding any prior legal status of any adult entertainment or services facility (as defined in Part 11), as of July 1, 1996, no adult entertainment or service facility shall be operated unless it is located on a site or parcel which is zoned CCG-2, an exception has been granted or which is zoned CCBD; provided however, the requirement for an exception shall not be imposed if the facility was lawfully operating as an adult entertainment or service facility prior to the zoning code being amended to require an exception and its facility has continuously operated as such a facility.

The remaining sections of Section 656.725 provide for alternative amortization periods in the event the amortization

period to July 1, 1996, is declared to be invalid or otherwise nonenforceable. For example, § 656.725(b) extends the amortization period to July 1, 1997; § 656.725(b) provides for an amortization period until July 1, 1998, and so on.

The shortest amortization period provided in the Ordinance Code is approximately 19 months from the enactment of Ordinance 95-190-651 and approximately 15 months from the enactment of Ordinance 95-307-109. The Court finds the amortization period to July 1, 1996 to be reasonable. *See T-Marc,* 804 F.Supp. at 1504 (upholding a one year amortization period); *SDJ, Inc. v. City of Houston,* 636 F.Supp. 1359 (S.D.Tex.1986), *aff'd,* 837 F.2d 1268 (5th Cir.1988) (upholding a six month amortization period).

Accordingly, Plaintiffs' Motion for Partial Summary Judgment as to the Ordinance's failure to provide a reasonable amortization period is **DENIED**. The remainder of Plaintiffs' Motion for Partial Summary Judgment as to license disclosures and disparate sentencing guidelines is without merit and is therefore **DENIED.**

B. J.R.'s

(1) Procedural Safeguards for Zoning Exceptions

For the reasons discussed in section II.A.(6)(a), Plaintiffs' Motion for Partial Summary Judgment as to the Issue of Procedural Safeguards for Zoning Exceptions (Doc. No. 20) is **GRANTED IN PART** and **DENIED IN PART.** As previously held in this opinion, section 656.131(c)(2) of

the Jacksonville City Code is declared to be unconstitutional, and is severed from the Ordinance. The remaining criteria of § 656.131(c) are valid, and Plaintiff's motion for partial summary judgment with respect to enactment procedures of those criteria is denied. Defendant's cross Motion for Summary Judgment on the issue of procedural safeguards (Doc. No. 26) is **DENIED IN PART,** in that the Court previously held earlier in this opinion that section 656.131(c)(2) of the Jacksonville City Code is unconstitutional, and is severed from the Ordinance. In all other respects, Defendant's cross Motion for Summary Judgment on the issue of procedural safeguards (Doc. No. 26) is **GRANTED.**

(2) Alternative Avenues of Communication

For the reasons discussed in section II.A.(6)(a) and section III, Plaintiffs' Motion for Partial Summary Judgment as to the Issue of the Availability of Alternate Sites (Doc. No. 20) is **DENIED.** The City's cross Motion for Summary Judgment with respect to the issue of availability of alternate sites (Doc. No. 26) is **GRANTED.**

(3) Narrowly Tailored to Further City's Interest

For the reasons discussed in section II.A.(6)(b), Defendant's Motion for Summary Judgment with respect to whether the Ordinance Code provisions are narrowly tailored to serve the government interest at issue is **GRANTED.**

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(4) Amortization Period

For the reasons discussed in section II.A.(7), Plaintiffs' Motion for Partial Summary Judgment as to the Issue of Amortization (Doc. No. 20) is **DENIED.**

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

On July 31, 1997, the Court heard evidence on the remaining issues in dispute: whether the provisions in the Ordinances (1) requiring a minimum 1000 ft. room size, section 150.301(h) of Ordinance 95-307, and (2) prohibiting adult businesses from operating between the hours of 2:00 A.M. and 12:00 Noon, section 150.422 of Ordinance 94-190, are narrowly tailored to achieve the legitimate government interests of combating secondary effects of nude dancing and, in addition, whether the 1000 feet room requirement allows reasonable alternative avenues of communication.

A. 1000 Ft. Room Size

Section 150.301, Ordinance 95-307, sets forth the general size requirements for adult entertainment establishments. Rooms which are legal in these facilities fall into four categories: (1) the entrance room or lobby, which may be of *any* size; (2) sanitary facilities; (3) rooms marked "no customers or patrons allowed;" and (4) all other rooms, which must not be less than 1,000 square feet in area.

Specifically, the Ordinance Code provides:

> (g) All premises shall have an entrance room or lobby, i.e., the room which is entered from the

> outside, and sanitary facilities as set forth in subsection (e). The entrance room or lobby may be as large or as small as the licensee chooses.
>
> (h) All other rooms [other than entrance room or lobby, i.e., "the room which is entered from the outside," *see* § 150.301(g)] must either:
>
> (1) be not less than 1,000 square feet in area; or
>
> (2) be clearly marked in letters not less than two inches in height "No Customers or Patrons Allowed".

§ 150.301(g), (h). Plaintiffs assert the 1000 square feet room requirement is irrational and serves no government interest, and therefore is not narrowly tailored. Furthermore, Plaintiffs argue the size requirement does not allow them alternative avenues of communication within the City of Jacksonville.

As discussed earlier in this opinion, the Court previously found the Ordinances were enacted to combat the undesirable secondary effect of nude entertainment — a legitimate government interest. *See* Order of June 29, 1996, at 10-11. The Court therefore will focus on whether the Ordinances are narrowly tailored to serve the government interest. The Court will refer to the earlier part of this opinion, wherein the evidence showed that a total 95 sites were potentially available within the CCBD and CCG-2 zones that met the distance requirements of the Ordinances, and the Court found that as a matter of law, that number provided Plaintiffs reasonable avenues of communication. *See* section

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II.A.(6)(a). The Court also determined as a matter of law that with only one exception, the exception criteria of § 656.131(c) pass constitutional scrutiny, and severed the offensive criteria. *Id.* The parties presented additional evidence at trial with respect to the 1000 square feet room requirement, which the Court will consider to determine if the provision is narrowly tailored to achieve the governmental objective of combating secondary effects of nude dancing and whether Plaintiffs still have reasonable avenues of communication given the size requirement.

Brian Cleland testified that he operated his business called "Touch of Class" on 8841 Atlantic Boulevard pursuant to a written lease entered into on June 1994. Plaintiff's Ex. 1. He operated his business for five months before the initial Ordinance was enacted.

Cleland described his business as nude entertainment consisting of nude and partially nude dancing akin to a traditional striptease type of performance. The dancers/models, who were independent contractors, performed mostly to music. Cleland also sold lingerie on the premises. He described the physical layout of his business as follows: a foyer area in the front part of the building, about 4 feet by 6 feet in size, in which there was a locked guard gate with an employee stationed there to prevent anyone from entering the rest of the building without consent; a "lounge," which was the largest room at 16 feet by 20 feet, or 320 square feet; and two "session" rooms or modeling studios in the rear of the building approximately 10 feet by 12 feet in size. The lingerie was showcased in the lounge area, where it and other novelty items were sold. The business was 850 square feet in total.

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The session rooms had a partition behind which the model could change clothes. The doors on the session rooms closed but did not lock and the rooms had peepholes which Cleland used to occasionally monitor the sessions "so no one would do anything wrong." Cleland testified that when he looked through the peepholes, he occasionally saw customers masturbating and exposing their genitals to the women. On further questioning, Cleland admitted that he did not consider masturbation and exposed genitals to be "wrong." Rather, he said the peepholes were there for the models' protection, to prevent undue physical harassment by the customers. He was aware the models were tipped by customers and confirmed that tips from clients were their only form of compensation; they were not paid anything by Cleland.

Cleland testified that when the Ordinance was enacted, he could not retrofit his business to meet the 1000 square feet room requirement. He said he would have had to move his business to another location, and he did not know of any. He testified that he went to a particular area, and found a potential site to relocate his business. However, Cleland said that although he possibly could "physically" operate the modeling studios if they were 1000 square feet, he could not do so economically. Cleland voluntarily closed his business on March 1, 1995, reopened it on March 11, 1995, and again closed it on April 3, 1995, and it has remained closed.

Jerome Bonnett testified that he operated Lady J's Lingerie for two years before the Ordinances were enacted. His business consisted of an open showroom, which was 20 feet by 20 feet in size and the largest room; a small lounge

area for the models with a TV; four modeling rooms, approximately 10 feet by 12 feet each, with doors and "look holes"; and a manager's room. Unlike Cleland's business, Lady J's did not have a foyer. The total square footage of Lady J's was 1500 square feet.

Bonnett described his business as a retail lingerie shop with private modeling in which the models performed semi-nude dance wearing some, albeit transparent, lingerie, usually to music. He, too, compared their performances to traditional striptease in adult night clubs. Bonnett also admitted that he was aware of masturbation and display of genitals "in some cases" at Lady J's, and that the modeling rooms contained tissues and lotion in "anticipation" of such activities. His models, too, were only compensated through tips from clients. He said he did not know if his business would be able to operate without doors on the modeling rooms or if there was a large open room. He said he never tested the feasibility of those changes. Like Cleland, Bonnett testified he used the look holes primarily for the protection of the models, so they would not be "roughed up" by clients.

When the Ordinance was enacted, Bonnett's business did not meet the 1000 square feet room requirement. He checked with his landlord to see if his business could be retrofitted, but learned that because of the construction of the walls, it could not be done. He checked briefly to find a new location, but could not find one. Lady J's was closed in April 1995. Bonnett operates similar businesses in other cities, but none in Jacksonville. Prior to the Ordinance, Bonnett testified that there were 10 to 15 "lingerie shops" similar to Lady J's in Jacksonville, and now there are none.

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Plaintiff's expert, Bruce McLaughlin, a renowned expert in land use law who has testified nationally in numerous federal and state cases concerning adult entertainment ordinances,[8] testified concerning an exhaustive survey he conducted in Jacksonville to determine the availability of sites in the City. McLaughlin explained his methodology to the Court. He took a random sample of the five planning areas of the City, to insure statistically significant representation of buildings in all types of zoning areas, and took external measurements of all free standing buildings in those areas. He determined from his survey that approximately 50% of the sites were immediately disqualified because they would not meet the 1000 square feet room requirement of the Ordinance. After excluding other locations, i.e., strip center areas and other areas in which Plaintiffs could not meet additional requirements such as restrictive covenants, parking lot requirements, etc., McLaughlin concluded that "close to 60%" of the available sites in Jacksonville were eliminated from consideration because of the Ordinance.

Initially the Court notes that although Plaintiffs appear to focus their attack on the 1000 square foot room requirement, the Ordinance does not prevent Plaintiffs from expressing their erotic message in rooms smaller than 1000 square feet. The Ordinance allows that the "room which is entered from the outside" to be of *any* size. Therefore, Plaintiffs' contention that they cannot find sufficient

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8. McLaughlin was certified as an expert in land use law, particularly with respect to adult businesses. *See* Plaintiffs' Exhibit 3 (McLaughlin List of Trial Testimony) and Exhibit 4 (McLaughlin Resume).

buildings in the City of Jacksonville that would accommodate the Ordinance's size requirements is without merit. The evidence in this case clearly showed that with some minor retrofitting, Plaintiffs could simply move the performances from the back of their buildings to their front rooms. In that case, they could make the rooms as large or as small as they wish. There is no restriction in the Ordinance that nude dancing could not take place in the entrance rooms. Plaintiffs' claim that they cannot put the performances in the front room for fear of someone, i.e., a female shopper, inadvertently entering their "lingerie shop" expecting a traditional retail lingerie store, such as Victoria's Secret, is a potential problem but not one in which the City need concern itself. Plaintiffs could dispel that problem by placing signs outside the building alerting potential customers the adult conduct inside. In any event, the Ordinance need only provide Plaintiffs with *reasonable* avenues of communication, which the Court finds that it does.

In addition, based on the evidence adduced at trial, plus the previous evidence submitted in the record, the Court finds that even the 1000 square feet room requirement is both narrowly tailored to achieve the legitimate government objective of preventing secondary effects of masturbation and prostitution,[9] and that there exist reasonable avenues of

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9. There was no evidence presented at trial that prostitution takes place in the modeling rooms at Plaintiffs' establishments. However, an affidavit of a Jacksonville Sheriff's Office police officer (Doc. No. 14), submitted in support of the City's opposition to Plaintiffs' motion for preliminary injunction, and City of Jacksonville Records (Doc. No. 26), describing arrests for, *inter*

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communication in which Plaintiffs can operate their businesses and still meet the requirements of the Ordinance. As to the first finding, Plaintiffs' own witnesses testified that masturbation took place in the modeling rooms, and was in fact anticipated by the owners that it would occur, as evidenced by their providing tissues and lotion for that purpose. The Ordinance provision seeks to prevent customers from masturbating in the presence of a nude or scantily clad woman who will earn her entire "tip" from the masturbating man who is closed in a room along with the naked woman. A larger room would still allow the "performers" to engage in the type of expression Plaintiffs described, a traditional form of striptease, while at the same time discouraging the unwanted secondary effects of public masturbation, a legitimate government objective. By requiring a larger room, the establishment is encouraged to allow multiple entertainers and customers in the same room at the same time, again

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alia, prostitution at lingerie shops, and providing studies from other cities concerning the secondary effects of nude dancing establishments in promoting prostitution and lewd and lascivious behavior, and other illegal acts, submitted in support of Defendant's motion for summary judgment, clearly show evidence of prostitution at Plaintiffs' and similar types of establishments. Of course, *Renton* held that a city may rely on its own as well as other cities' studies to demonstrate secondary effects. 475 U.S. at 51-52, 106 S.Ct. at 930-31. The same evidence in the record in this case also confirms that the male customers who frequented the establishments were encouraged by the models to "get comfortable," which is what the models were told by the owners to say to the customers to get them to disrobe and masturbate. The models used the term "get comfortable" so that she would know that the male in the room with her was not a police officer before she went too far.

discouraging secondary effects.[10] In *Barnes,* the Supreme Court classified totally nude dancing as "expressive conduct within the outer perimeters of the First Amendment," but only "marginally so." 501 U.S. at 566, 111 S.Ct. at 2460. In this case, accepting Plaintiffs' testimony that the type of expression the models perform is akin to a traditional striptease, certainly Plaintiffs are afforded no greater protection than a minimal level. The Ordinances in this case allow Plaintiffs the opportunity to express their erotic message — nude dancing — to a potentially larger audience without the additional risk of promoting the unwanted effects of public masturbation and prostitution that individual performances in a private room encourage.

As to the second issue, the Supreme Court in *Renton* found that the more than five percent of the entire land area of the city that was open to use as adult theater sites allowed for reasonable alternative avenues of communication. 475 U.S. at 53, 106 S.Ct. at 931-32. Under the *Renton* standard, by Plaintiffs' experts own testimony, the nearly forty percent of sites that would be available for Plaintiffs' businesses

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10. Plaintiffs have taken issue with the size of the room, because it diminishes the opportunity for the models to perform individually in front of customers, exactly what the Ordinance is seeking to prevent. Undeniably, the 1000 square foot rooms are considerably larger than the approximate 10 feet by 12 feet rooms in which Plaintiffs' models had performed. However, a room of 1000 square feet, or 32.5 feet by 31 feet, is actually not much larger than a living room in a private home. Therefore, it is small enough to still provide an atmosphere conducive to legal adult entertainment while at the same time inhibiting individual performers and customers from physically interacting — thus it is narrowly tailored to achieve the City's legitimate objectives.

would easily pass constitutional scrutiny. The fact that fewer sites might be available because Plaintiffs, as anyone, also would have to comply with other zoning restrictions or otherwise fend for themselves in the real estate market does not give rise to a First Amendment violation. As the Supreme Court noted, "the First Amendment requires only that [the city] refrain from effectively denying [plaintiffs] a reasonable opportunity to open and operate [an adult business] within the city," and, like in *Renton,* the Ordinance before the Court "easily meets this requirement." 475 U.S. 41, 54, 106 S.Ct. 925, 932. Of course, McLaughlin also did not appear to consider a "common sense" solution to the problem of the smaller-size sites within strip malls — that is, that Plaintiffs could purchase more than one site and remove walls to accommodate the 1000 feet room size. There is no prohibition in the Ordinance that there cannot be archways within the larger-size room, because the room still would achieve the objectives of the Ordinance — providing a larger open area to discourage unwanted secondary effects — while still allowing Plaintiffs ample opportunity to express their message. Factoring in those additional sites would add to the "nearly forty percent" of sites Plaintiffs' expert testified were available for Plaintiffs to utilize for their businesses, and certainly would meet the requirements of *Renton.*

B. Hours of Operation

Section 150.422, Ordinance 94-190, provides:

> (a) Adult entertainment facilities, adult bookstores and adult movie theaters shall not be open between the hours of 2:00 a.m. and noon.

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Brian Cleland, owner of Plaintiff "Touch of Class," testified that during the five months he operated his business, his hours of operation were 11:00 a.m. until 2:00 a.m. He said that about 10 to 15% of his customers patronized his business during the morning hours, and would have to turn customers away if he complied with the hour restriction in the Ordinance. On cross-examination, however, Defendant pointed out that during his deposition, Cleland testified that his business operated between the hours of 4:00 p.m. and 1:00 a.m., and did not say anything about morning hours. *See generally* Deposition of Cleland, Doc. No. 87.[11] Cleland did not contest his earlier testimony. Jerome Bonnett, who operated Lady J's Lingerie for two years, operated his business from 10:00 a.m. to 3:00 a.m. weekdays, and 10:00 a.m. to 4:00 a.m. on weekends. His testimony was that he generated the same level of business between the hours of 10:00 a.m. to noon as he did from 3:00 a.m. to 4:00 a.m., although he did not testify as to what proportion of his total business was generated during those hours. However, Bonnett admitted that the Ordinance's provision restricting hours of operation played only a limited part in his decision not to re-open his business. The Court also heard from Plaintiff's zoning expert, Bruce McLaughlin, on the City's regulation of hours of operation. McLaughlin testified that the three major reasons for government to limit hours of

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11. Defendant used Cleland's deposition testimony only to impeach his testimony at trial, and did not enter the deposition into evidence. However, the City previously had submitted Cleland's deposition in the Court file (Doc. No. 87, filed September 17, 1996) in support of its motion for summary judgment (Doc. No. 85, filed the same day); therefore, the Court may consider the deposition since it is part of the record in this case.

operation are (1) the potential impact on other properties, (2) for safety reasons, to allow fire marshals and other officials access to inspect properties, and (3) for crime concerns. Typically, the types of businesses in which hours are regulated for those reasons are bars and taverns. McLaughlin said that according to the Planning Division of the Jacksonville Sheriff's Office, the peak times for police demand are late afternoon and early evening. He testified that demand between the hours of 10:00 a.m. to 11:00 a.m. was 3.9% and between 11:00 a.m. to noon was 4.1%, compared to 6.3% of total demand for the late afternoon/ evening hours. In McLaughlin's opinion, there was no rational or legitimate connection between police demand and the hours restriction in the Jacksonville Ordinance, and that it was merely a "back-door" attempt to limit or eradicate adult businesses in Jacksonville.

Officer Anthony Quintero, a vice detective in the Jacksonville Sheriff's Office (JSO), testified for Defendant. Quintero testified that in his nearly three years experience on the vice squad and over 7 years with the JSO, there was a positive correlation between the hours of operation of adult businesses in the areas in which some of Plaintiffs operated and the level of prostitution in the area — the more customers in the adult businesses, the more customers that were available for prostitutes. He further testified that while most of the prostitution occurred during the evening hours, when further pressed on cross-examination, the officer admitted the "positive correlation" between prostitution and the hours of operation was highest between the hours of 12:00 noon and 2:00 a.m. Finally, Officer Quintero admitted that no arrests for prostitution had been made at any of Plaintiffs'

clubs, and that in fact, the officer was not working vice during the time Plaintiffs were operating their businesses.

Notwithstanding Officer Quintero's testimony, which the Court does not find to have contributed any additional support to Defendants' argument regarding the correlation of police activity and hours, the Court does not find the restriction on hours of operation to be an unreasonable restriction on Plaintiffs' free speech rights. First, the Court does not find Cleland was a credible witness on that issue. On cross-examination, Defendant pointed out that during his deposition, Cleland testified that his business operated between the hours of 4:00 p.m. and 1:00 a.m., and did not say anything about morning hours. *See* Deposition of Cleland, Doc. No. 87. Cleland did not contest his earlier testimony. Second, even the Jerome Bonnett, who said that the change in hours would have reduced his business, testified that the hours provision played a "limited part" in his decision not to reopen.

Ordinances restricting the hours of operation in adult-oriented establishments have been upheld on numerous occasions. The courts addressing the issue have found that the noise and increased crime rate during the wee hours of the morning justifies a modest reduction in hours of operation. *See Star Satellite, Inc. v. City of Biloxi,* 779 F.2d 1074 (5th Cir.1986) (upholding adult business ordinance which restricted hours of operation for adult bookstore to 10:00 a.m. to 12 midnight, Mondays through Saturdays, with no hours of operation allowed on Sundays); *Kutrom Corp. v. City of Center Line,* 979 F.2d 1171 (6th Cir.1992) (massage parlor; 9:00 p.m. closing); *Envy Limited v. City of Louisville,*

734 F.Supp. 785, 789 (W.D.Ky.) (restriction in hours of operation of adult businesses from 12:00 a.m. to 6:00 a.m. justified due to increase in crime rate during those hours); *Ellwest Stereo Theater, Inc. v. Boner,* 718 F.Supp. 1553, 1577 (M.D.Tenn.1989) (restriction of operation of adult businesses between 3:00 a.m. and 8:00 a.m. on weekdays and Saturdays and between 3:00 a.m. and 12:00 noon on Sundays is only a "minimum infringement" on the plaintiffs' First Amendment rights and "is justified by the difficulty of policing and enforcing the ordinance in the wee hours of the morning").

In this case, the Jacksonville Ordinance limits adult businesses from operation between the hours of 2:00 a.m. and 12:00 noon, leaving fourteen hours in every day, over 5,000 hours per year, in which the adult entertainment establishments may operate and express their message. The Third Circuit upheld a restriction that required a 10:00 p.m. closing and limited adult entertainment to 3,600 hours per year, saying, "We think the Constitution requires no more." *Mitchell v. Commission on Adult Entertainment Establishments of the State of Delaware,* 10 F.3d 123, 139 (3rd Cir.1993). According to the testimony of one adult business, the hours restriction represents at most a four-hour reduction in Plaintiffs' business, two of those hours during the slower period from 10:00 a.m. to noon. The Court finds that the manner in which the City seeks to regulate the hours of adult businesses rationally relates to the goal of preventing crime, a legitimate government interest. The restricted hours of operation fall within the period of time when crime is more likely to occur and law enforcement personnel are more likely to be busy with other matters. Given the fact that

Plaintiffs may express their erotic message for fourteen hours per day, seven days per week, such a restriction does not infringe upon Plaintiffs' First Amendment rights, because the requirement serves a legitimate interest of preventing crime and is narrowly tailored to achieve that interest.

IV. OTHER CONSTITUTIONAL CLAIMS

Although not raised at trial, Plaintiffs had raised other claims in its complaint that the Court must address.

(1) Void for Vagueness Claim

Plaintiffs allege that Ordinance 94-190-651 is void for vagueness in various respects. One of the sections that Plaintiffs' claims is void for vagueness, section 150.212, previously was declared unconstitutional by this Court in its Order of March 10, 1995, granting Plaintiffs' preliminary injunction (Doc. No. 18), and was subsequently amended in Ordinance 95-307-109. Therefore, Plaintiffs' claim as to that section is moot. The remaining sections that Plaintiffs claim are void for vagueness are: Sections 150.205(10), 150.206, 150.501, 150.103(n), 150.103(i), 150.410, and 150.504. *See* Complaint at 8.

A statute is facially vague in violation of due process only when the law is impermissibly vague in all of its applications. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497, 102 S.Ct. 1186, 1192-93, 71 L.Ed.2d 362 (1982). The Court finds after carefully reviewing each of the claimed offensive provisions that none

of the provisions suggested by Plaintiffs is vague in all its applications. Therefore, Plaintiffs' claim that the Ordinance is void for vagueness is **DENIED.**

(2) Equal Protection Claim

Plaintiffs claim that Ordinance 94-190-651 includes certain exemptions which violate Plaintiffs' rights of Equal Protection under the Fourteenth Amendment to the United States and Florida Constitutions.

The Supreme Court recently discussed the standard by which courts must review legislation to determine if the equal protection challenge is valid:

> In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. [Citations omitted.] Where there are "plausible reasons" for [the government's] action, "our inquiry is at an end." [Citation omitted.]

Federal Communications Commission v. Beach Communications, Inc., 508 U.S. 307, 313-14, 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211 (1993). The Court also noted that the absence of legislative facts explaining the distinction on the record has no significance in a rational-basis analysis. "In other words, a legislative choice is not subject to

courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 315, 113 S.Ct. at 2102.

With the exception of the exemption for facilities owned or operated by the City of Jacksonville, found in section 150.611(a), the Court finds that the City has come forth with "plausible reasons" for most of the exemptions in the Ordinance Code. With respect to the exemption in section 150.611(a), the City argues that City facilities are exempt because "[t]hey have never once sponsored or held an event where prostitution occurred." *See* City's Memorandum in Support of its Motion for Partial Summary Judgment (Doc. No. 25) at 18.

The Court disagrees that the relevant question is whether prostitution, a so-called secondary effect of adult entertainment which the Ordinance is seeking to prevent, occurred at the establishment. The relevant question is whether *adult entertainment* which may lead to the undesired secondary effects of prostitution, etc., has the potential to occur on the exempt property.

While there is no evidence in the record of the cases presently before the Court that such activity has taken place on City-owned property, the Court takes judicial notice of another matter pending before this Court in which the evidence clearly shows there is entertainment taking place on what is possibly property which the Ordinance exempts because, presumably, it is owned by the City.[12] In *White's*

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12. There is currently pending in state court the issue of whether the property on which The Gold Club is located, which is owned

(Cont'd)

Appendix B

Place, Inc. v. Nathaniel Glover, Case No. 97-930-Civ-J-20C, filed on July 28, 1997, Plaintiff seeks a preliminary injunction against the City of Jacksonville prohibiting the City, *inter alia,* from enforcing the Jacksonville Adult Entertainment and Services Code, the Ordinance at issue in this case. The Plaintiff in that case operates a business called "The Gold Club," a show bar that engages in adult entertainment. Plaintiff claims the property on which The Gold Club operates is City-owned property, and is therefore exempt from the provisions of the Ordinance Code. There is evidence in that case there may be touching between customers and nude performers.

The Court need not resolve whether the property on which The Gold Club is located is or is not City-owned property. Defendant has not stated a rational basis for the exemption because there is a *possibility* that nude entertainment, and the secondary effects which follow, can in fact occur on City-owned property. Thus, Defendant's stated rational basis is not even plausible. Accordingly, the Court finds that the exemption in Ordinance 94-190-651 and 95-307-109, § 150.611, for City-owned or operated facilities, is unconstitutional as it violates the Equal Protection Clause of the Fourteenth Amendment.

(Cont'd)
either by the Jacksonville Port Authority or the City of Jacksonville or both, is subject to the exemption of the Ordinance Code. How ever that issue is resolved is not dispositive in this case, because the Court is declaring the City-owned property exemption unconstitutional. Therefore, it does not matter how the state court rules on the property issue.

However, the Ordinance has a self-executing severability clause in section 150.611, which clearly provides that if the exemptions are "held or declared invalid or unconstitutional, in whole or in part, then the entire exemption is void and invalid and no person shall be entitled to such exemption." Thus, the Court can sever the above exemption, § 150.611(a), from the Ordinances. Accordingly, with the exemption severed from the Ordinance Code, City-owned or operated property is no longer exempt. *See* Ordinances 94-190-651 and 95-307-109, § 150.611(b). The remaining provisions of the Ordinances are applicable.

V. CONCLUSION

With the exception of §§ 150.611(a) and 656.131(c)(2) of the Jacksonville City Code, which the Court find to be unconstitutional, and which will be severed from the Ordinance Code, the Court finds that the Ordinances at issue (1) are content-neutral; (2) are designed to serve a substantial government interest; (3) do not unreasonably limit alternative avenues of communication; and (4) are narrowly tailored to serve the government interest at issue. Moreover, they are not void for vagueness, do not violate Plaintiffs' federal due process rights, and, with the exception noted above for section 150.611(a), do not amount to an equal protection violation.

Accordingly, it is ORDERED AND ADJUDGED:

Case No. 95-181-Civ-J-20A/95-434-Civ-J-20A:

(1) Defendant's Motion for Judgment of Dismissal with Prejudice as to Plaintiffs Amy Watson and Michael Crowell

(Doc. No. 56) is **GRANTED**. This action as to Plaintiffs Amy Watson and Michael Crowell is hereby **DISMISSED WITH PREJUDICE;**

(2) Defendant's Motion for Partial Summary Judgment as to Enactment Procedure for Challenged City Ordinances (Doc. No. 57) is **GRANTED;**

(3) Plaintiffs' Motion for Partial Summary Judgment as to the Issue of Availability of Alternate Sites is **GRANTED IN PART** in that the Court declares § 656.131(c)(2) of the Jacksonville City Code to be unconstitutional, and will sever that provision from the Ordinance; in all other respects, Plaintiffs' Motion for Partial Summary Judgment as to the Issue of Availability of Alternate Sites (Doc. No. 78) is **DENIED;**

(4) Plaintiffs' Motion for Partial Summary Judgment as to the Issue of Amortization (Doc. No. 78) is **DENIED;**

(5) Plaintiffs' Motion for Partial Summary Judgment as to the Issue of License Disclosures and Disparate Sentencing (Doc. No. 78) is **DENIED;**

(6) Defendant's Motion for Summary Judgment of Dismissal for Lack of Standing (Doc. No. 82) is **DENIED;**

(7) Defendant's Motion to Dismiss Plaintiff Gregory A. King for Lack of Standing (Doc. No. 84) is **MOOT;**

(8) Defendant's Motion for Summary Judgment (Doc. No. 85) is **DENIED;**

(9) The Clerk shall enter judgment in favor of Plaintiffs, and against Defendant, on their claims for declaratory and injunctive relief for Ordinances 94-190-651 and 95-307-109, § 150.611(a), which provision is declared to violate the Equal Protection Clause of the Fourteenth Amendment and, according to Defendant's Ordinance, are held invalid;

(10) The Clerk shall enter judgment in favor of Defendant City of Jacksonville and against Plaintiffs on Plaintiffs' claims for declaratory and injunctive relief and for damages, with the exceptions noted in (3) and (9) above, where the Court declared §§ 150.611(a) and 656.131(c)(2) of the Jacksonville City Code to be unconstitutional severed the provisions from the Ordinance Code. Plaintiffs' remaining claims, and Plaintiffs' request for injunctive and declaratory relief and for damages, is **DENIED.**

Case No. 95-1005-Civ-J-20A:

(11) Plaintiffs' Motion for Partial Summary Judgment as to the Issues of Procedural Safeguards for Zoning Exceptions and Amortization (Doc. No. 20) is **DENIED;**

(12) Plaintiffs' Motion for Partial Summary Judgment as to the Issue of the Availability of Alternate Sites and Amortization (Doc. No. 20) is **GRANTED IN PART,** in that the Court declares § 656.131(c)(2) of the Jacksonville City Code to be unconstitutional, and will sever that provision from the Ordinance; in all other respects, Plaintiffs' Motion for Partial Summary Judgment as to the Issue of Availability of Alternate Sites (Doc. No. 20) is **DENIED;**

(13) Defendant's cross Motion for Summary Judgment (Doc. No. 26) is **GRANTED IN PART** and **DENIED IN PART:**

(A) With respect the issue of procedural safeguards, the motion is **DENIED IN PART,** in that Section 656.131(c)(2) of the Jacksonville City Code is held to be unconstitutional, and is severed from the Ordinance.

(B) In all other respects, Defendant's cross Motion for Summary Judgment (Doc. No. 26) is **GRANTED.**

(14) The Clerk shall enter judgment in favor of Plaintiffs, and against Defendant, on their claims for declaratory and injunctive relief for § 150.611(a) of the Ordinance, which provision is declared to violate the Equal Protection Clause of the Fourteenth Amendment and, according to Defendant's Ordinance, is held invalid.

(15) The Clerk shall enter judgment in favor of Defendant City of Jacksonville and against Plaintiffs on Plaintiffs' claims for declaratory and injunctive relief and for damages, with the exceptions noted in (13)(A) and (14) above, where the Court declared §§ 150.611(a) and 656.131(c)(2) of the Jacksonville City Code to be unconstitutional severed the provisions from the Ordinance Code. Plaintiffs' remaining claims, and Plaintiffs' request for injunctive and declaratory relief and for damages, is **DENIED.**

APPENDIX C

ADULT ENTERTAINMENT AND SERVICES CODE CITY OF JACKSONVILLE, FLORIDA

TITLE VI. BUSINESSES, TRADES AND OCCUPATIONS

CHAPTER 150 ADULT ENTERTAINMENT AND SERVICES CODE

* * *

PART 1. GENERAL PROVISIONS

150.101 Legislative findings. The Council makes the following legislative findings:

(a) There are businesses in the city which allow, or engage in, possession, display, exhibition, distribution and sale of books, magazines, motion pictures, prints, photographs, periodicals, records, novelties and devices which depict, illustrate, describe or relate to specified sexual activities.

(b) There are businesses in the city where parts of one person are treated or encoun ered by rubbing, stroking, kneading or tapping by a second person, accompanied by the display or exposure of specified anatomical areas.

(c) There are businesses in the city which allow or encourage employees, agents or other persons to display or expose specified anatomical areas.

(d) When the activities detailed in subsections (a), (b), or (c) are present in an area of the city, other activities tend to accompany them which are illegal, immoral or unhealthful, such as prostitution, pandering, solicitation for prostitution, lewd and lascivious behavior, exposing minors to harmful materials, possession, distribution and transportation of obscene materials, sale or possession of controlled substances and violent crimes against persons and property, and these illegal, immoral or unhealthful activities tend to concentrate around and be aggravated by the presence of the activities detailed in subsections (a) and (b) and (c).

(e) The buildings and establishments in which these activities and business operations take place:

(1) Are conducive to and are often used for the commission of immoral, lewd, indecent or illegal acts.

(2) Are constructed, in part or in whole, of substandard materials or in disregard for the health and safety of patrons and customers.

(f) The business operations and activities mentioned in subsections (a), (b) and (c) are commercial ventures, operated for the purpose of making a profit, and as such are proper subjects for regulation by the city in the interest of the health, safety and welfare of the public.

* * *

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150.102 Title. This chapter may be known and cited as the *Adult Entertainment and Services Code.*

* * *

150.103 Definitions. In this chapter, unless the context otherwise requires:

* * *

(b) *Nude entertainment* means, while on the premises of a commercial establishment, the act of exposing or displaying specified anatomical areas, (1) for compensation or valuable consideration or for the opportunity to obtain compensation or valuable consideration, (2) to a person other than employee of the establishment or of the person operating or controlling the establishment.

(c) *Adult entertainment establishment* means a commercial establishment where the owner, or an employee or agent of the owner, suffers, permits, allows, encourages, or pays any person to engage in nude entertainment on the premises. Adult entertainment establishment also includes any establishment which contains or operates an adult entertainment booth.

* * *

(m) *Specified anatomical areas* means:

(1) Less than completely and opaquely covered:

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(i) Human genitals or pubic region.

(ii) Human buttocks.

(iii) Human female breasts below a point immediately above the top of the areola.

(2) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

* * *

(v) *Auditorium* means a room designed to accommodate an audience which room:

(a) shall meet each of the following requirements:

(1) the room is not less than four thousand square feet in area;

(2) the stage shall either (A) be raised not less than three feet above the floor on which the nearest seating is located or (B) be not less than three feet from the nearest seat;

(3) there shall be only one stage;

(4) food and beverages are prohibited within the room;

(5) tables are prohibited within the room for seating of customers or patrons;

(6) all seating shall be arranged to face the same direction;

(7) all seating shall face the stage;

(8) no portion of the stage shall be constructed or arranged or used unless it is in front of, and is faced by, all seats.

(b) shall meet each of the following requirements:

(1) the room is not less than twenty-five thousand square feet in area;

(2) Ninety percent of the seating, except for seating areas designed for the handicapped, shall be fixed to the floor and facing the stage;

(3) No portion of the stage shall have seats on more than one side of the stage unless that portion of the stage is not less than thirty feet across.

* * *

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(z) *Theatrical performance* means a performance which meets each of the following requirements:

(1) audience members are not required to pay any fee or charge to watch the performance unless such fee or charge is an admissions fee paid by purchase of an admissions ticket;

(2) audience members are not allowed to pay, directly or indirectly, any tip or other compensation to any performer;

(3) no performer shall request, solicit or accept any tip or other compensation from any member of an audience;

(4) the performance or show shall not last more than four hours;

(5) the performance or show shall not begin before noon nor end after midnight;

(6) no more than two performances or shows shall be held in one day at one location;

(7) no person shall expose or display specified anatomical areas except while the person is on the stage of an auditorium;

(8) upon purchase of an admissions ticket, the customer or audience member will either be assigned a seat or group of seats, or be allowed to

sit in any seat for the entire performance, and no subsequent fee paid, except the purchase of another admissions ticket, will permit the customer to sit in any different location than originally allowed;

(9) no member of the audience shall be allowed on the stage;

(10) the performance or show shall have a noticed starting time designated not less than forty-eight hours before the show or performance.

(aa) *Admissions fee* means the sum of money charged for admitting a person to any business establishment or other place or for the privilege of entering or remaining in any place and includes:

(1) any fee or money paid to view a performance;

(2) any fee or money paid to extend the length of time of a performance;

(3) any fee or money paid to alter a performance;

(4) any fee or money paid to allow a person into a different room, a different seat or a different place to view a performance;

(5) any fee or money paid to have a performer perform in a different location.

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(bb) *Admissions ticket* means a paper slip or card indicating that its holder has paid an admission fee.

* * *

(4) any fee or money paid to alter any service or performance by an escort;

(5) any tip paid to the escort.

(dd) *Adult entertainment booth* means any premises to which the public, patrons or members are invited or admitted and which are so physically arranged as to provide booths, cubicles, rooms, compartments or stalls separate from the common areas of the premises, wherein an entertainer provides entertainment to a member of the public, a patron or a member, when such entertainment is held, conducted, operated or maintained for a profit, direct or indirect. An adult entertainment booth includes, without being limited to, any premises that is physically arranged and used as such, whether advertised or represented as an entertainment studio, rap studio, exotic dance studio, encounter studio, sensitivity studio, modeling studio or any other term of like import. An adult entertainment booth shall not include theaters, concert halls, or similar establishments where entertainment is performed for groups of four or more. An adult entertainment booth shall not include any business regulated by the Department of Professional Regulation or the Florida Bar.

* * *

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(gg) *Nude entertainment booth* means any premises to which the public, patrons or members are invited or admitted and which are so physically arranged as to provide booths, cubicles, rooms, compartments or stalls separate from the common areas of the premises, wherein any person exposes or displays specified anatomical areas to a member of the public, a patron or a member, when such exposure or display is held, conducted, operated or maintained for a profit, direct or indirect.

(hh) *Regulated premises* means and includes all of the floor areas or land areas embraced within the plan appearing on or attached to the application for the license involved and designated as such on the plan and also means and includes any premises or business used for an adult entertainment establishment, adult movie theater, escort service, adult massage parlor or adult bookstore.

* * *

150.104 Scope of chapter. This chapter shall be the sole ordinance regulating adult entertainment and service activities, except such provisions as are contained in the Zoning Code. All other ordinances regulating or purporting to regulate adult entertainment and service activities, as herein defined and regulated, are made inapplicable to the adult entertainment and service activities.

* * *

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150.107 Exceptions from definitions.

(a) An adult entertainment establishment shall not include an auditorium where specified anatomical parts are displayed or exposed by performers during a theatrical performance; provided that the exposure or display or specified anatomical parts is incidental to the performance. Notwithstanding any ordinance or ordinance code provision to the contrary, in the event the exception created in this subsection (a) is held or declared invalid or unconstitutional, in whole or part, or if said exception is held to create an invalidity or unconstitutionality in other section or provision of this chapter, then the entire exception is void and invalid, and no person shall be entitled to such exception.

(b) In the event that the exception created in subsection (a) is declared void, invalid, or unconstitutional, then an adult entertainment establishment shall not include an auditorium where specified anatomical parts are displayed or exposed by performers during a theatrical performance. Notwithstanding any ordinance or ordinance Code provision to the contrary, in the event the exception created in this subsection (b) is held or declared invalid or unconstitutional, in whole or part, or if said exception is held to create an invalidity or unconstitutionality in other section nor provision of this chapter, then the entire exception is void and invalid, and no person shall be entitled to such exception.

* * *

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PART 2. ADMINISTRATION

150.201 Responsibility. Responsibility for the administration and enforcement of this chapter is vested in the Sheriff. The Building and Zoning Inspection Division is responsible for inspection of licensed premises and premises applying for a license in order to pass upon the construction and physical configuration of the premises involved. The Fire Marshal is responsible for inspection of licensed premises and premises applying for a license to ascertain compliance with the Fire Prevention Code. The Public Health Unit is responsible for inspection of licensed premises applying for a license to ascertain compliance with the Health Code and applicable state laws and regulations.

* * *

150.202 Power of Sheriff, etc. The Sheriff may make, adopt, amend, issue and repeal rules, regulations and administrative orders to implement this chapter. When a provision of this chapter gives the Public Health Unit, the Building and Zoning Inspection Division or the Fire Marshal the authority or duty to act, the authority or duty vests in the Public Health Officer, the Chief of the Building and Zoning Inspection Division or in the Fire Marshal or in any inspector who is given the authority or duty in accordance with the administrative procedures of the agency concerned, unless a specified person or public official is designated herein to exercise the authority or fulfill the duty.

* * *

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150.203 License required.

(a) It shall be unlawful for any person to engage in, conduct or carry on, or permit to be engaged in, conducted or carried on in the city, the operation of an adult bookstore, adult motion picture theater, adult entertainment establishment, or escort service without having first obtained a license under this chapter.

(b) Licenses referred to in this chapter shall be classified as follows:

(1) Adult bookstore;

(2) Adult motion picture theater;

(3) Adult entertainment establishment;

(4) Escort service.

(c) Each application for a license shall state the classification and location for which it is to be issued. A license may be issued in only one classification and for only one location, but this shall not prohibit an applicant from filing separate applications for licenses in two or more classifications at the same location.

(d) Where a person lawfully operated an adult bookstore, adult motion picture theater, adult entertainment establishment or escort service prior to this chapter being amended to require said person to obtain a license, said person shall have thirty days from the date of said amendment

in which to apply for the necessary license and may operate said business without a license for such time and until the Sheriff denies the request for a license and until the application is finally denied pursuant to s. 150.207.

(e) A person shall have the right to begin operating an adult entertainment establishment, adult bookstore, adult motion picture theater or escort service, forty-five days after applying for a license to operate such a business; provided, that the person must operate the business in compliance with all other provisions of this chapter and in compliance with all other applicable ordinances, laws and regulations. This right to operate granted by this subsection terminates upon final denial of a license as set forth in, and pursuant to, s. 150.207.

* * *

150.204 Disqualification.

(a) No license shall be issued if the Sheriff finds, as a result of his investigation or of the investigation of the Building and Zoning Inspection Division, the Public Health Unit or the Fire Marshal, that the proposed licensed premises does not meet each and every one of the general and special requirements for the type of license applied for as established in this chapter.

(b) No license shall be issued to:

(1) any individual, partnership or corporation whose license under this chapter has been revoked in the previous twelve months;

(2) any partnership, a partner of which has had his license under this chapter revoked in the previous twelve months;

(3) any corporation, an officer, director or principal stockholder of which has had his or its license under this chapter revoked in the previous twelve months; or

(4) any individual who is or has been a partner in a partnership or an officer, director or principal stockholder of a corporation, whose license under this chapter has been revoked in the previous twelve months;

* * *

150.205 License application; application fee.

(a) A person desiring to engage in the business of operating an adult bookstore, adult motion picture theater, adult entertainment establishment, or escort service shall file with the Sheriff a sworn application on forms supplied by the Sheriff. The application shall contain at least the following information and be accompanied by the following documents:

(1) If the applicant is:

(i) An individual, his name.

(ii) A partnership, the full name of the partnership and the name of the

managing partner and the names of all other partners, whether general or limited, accompanied by the partnership instrument or a certified copy thereof.

(iii) A corporation, the exact corporate name and state of incorporation and the name of the chief executive officer and the names of all other officers, directors and principal stockholders, accompanied by the articles of incorporation and all amendments thereto and the certificate of incorporation, or certified copies thereof.

(2) If the business is to be conducted under another name than that of the applicant, the business name and the county of registration under s. 865.09, Florida Statutes.

(3) Whether any of the individuals listed pursuant to paragraph (1) has, within the twelve-month period immediately preceding the date of the application, been convicted of a specified criminal act and, if so, the particular criminal act involved and the place of conviction. Conviction includes a plea of guilty, a plea of no contest, or withhold of adjudication of guilt upon being charged with a violation.

(4) Whether any of the individuals listed pursuant to paragraph (1) or whether the applicant

has had a license under this chapter previously revoked or has been a partner in a partnership or an officer, director or principal stockholder of a corporation whose license under this chapter has previously been revoked.

(5) The classification of the license for which the application is being filed.

(6) Whether the applicant holds another license in the classification for which the application is being filed and, if so, the number and location of the licensed premises.

(7) The proposed location of the business.

(8) The names of the employees, if known, or, if presently unknown or there will be no employees, a statement to that effect.

(9) A plan drawn to appropriate scale of the proposed licensed premises indicating the areas to be covered by the license, all windows, doors, entrances and exits and the fixed structural features of the proposed licensed premises. The term *fixed structural features* shall include walls, immovable partitions, projection booths, admission booths, concession booths or stands, immovable counters and similar structures that are intended to be permanent.

(10) Such other identification and information necessary to discover the truth of the

matters hereinbefore specified as required to be set forth in the application. Nothing contained herein shall be construed to deny to the Sheriff the right to take the fingerprints and additional photographs of the applicant, officers, directors, or partners, nor shall anything contained herein be construed to deny the right of said Sheriff to confirm, by independent investigation, the truth and accuracy of the above information.

(11) Proof of proper zoning from the Building and Zoning Inspection Division.

(b) Each application shall be accompanied by a nonrefundable fee of five hundred dollars, or by a receipt of the Tax Collector evidencing payment of the fee, at the time the application is filed.

* * *

150.206 Investigation. Upon receipt of an application properly filed and upon payment of the application fee, the Sheriff shall investigate both the qualifications of the applicant and the proposed licensed premises. The Public Health Unit, the Building and Zoning Inspection Division and the Fire Marshal shall investigate the proposed licensed premises for compliance with this chapter and other applicable ordinances relating to construction, safety, fire protection and public health. At the conclusion of their investigation, they shall endorse on the application the results and findings thereof, recommending either approval or disapproval of the application.

* * *

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150.207 Issuance; notice of denial; review; final denial.

(a) Upon the completion of the investigation of an application by the Sheriff and other interested agencies, the Sheriff shall approve or disapprove the application. The investigation shall be completed within thirty days of the application being filed. If approved, the license shall be issued upon the payment of the appropriate license fee provided in s. 150.215, evidenced by a receipt of the Tax Collector showing payment of the license fee.

(b) If the application is disapproved, the Sheriff shall give the applicant notice of the disapproval and the reasons therefor. If the Public Health Unit, the Building and Zoning Inspection Division or the Fire Marshal recommends disapproval, the application shall be disapproved by the Sheriff for the reasons stated by the agency recommending disapproval, in addition to any reasons that the Sheriff may have as a result of his investigation; otherwise, the Sheriff may disapprove the application for reasons he may have as a result of his investigation. These reasons shall be based only on non-compliance with this chapter. The application shall not be denied on the basis of failure to have an exception required by the zoning code where the applicant has submitted proof of applying for the proper exception and where the property is zoned Community/Commercial General-2 pursuant to Chapter 656. Where the applicant does not have the required exception for property zoned CCG-2 and has applied for such exception, the Sheriff shall defer approving or disapproving the application until the requested exception has been granted or denied.

(c) The Sheriff shall approve or disapprove the application within forty-five days of submittal of the application unless the applicant requests additional time.

(d) Except as set forth in subsection (b) above, not more than forty-five days after an application has been submitted, unless the application has been submitted, unless the applicant requests additional time, the Sheriff shall notify an applicant of the Sheriff's decision to grant or deny the license. Such notification shall be by certified or registered mail to the address in application or by personal service.

(e) Not more than ten days after notification referred to in subsection (d) above, excluding weekends and legal holidays, the Sheriff shall seek declaratory relief in a court of competent jurisdiction to determine the validity of the Sheriff's decision to deny the application. Nothing herein shall be deemed to affect the applicant's right to seek judicial review of the Sheriff's decision at any time.

(f) In any judicial review of denial of a license, whether review is brought by the Sheriff or the applicant, the burden shall be on the Sheriff to prove that the denial of the license is justified under the ordinance.

(g) For the purpose of s. 150.203, an application is not finally denied until the denial is approved by a trial court of competent jurisdiction.

* * *

Appendix C

150.208 Limitation on licensees and licensed premises. There shall be no limitation on the number of licenses issued, but licensed premises shall observe the placement limitations contained in Part 11, Chapter 656. A licensed premises may be owned by the licensee or may be leased by the licensee from a person not a licensee under this chapter; provided, that a licensee who is a tenant or lessee may not surrender his tenancy or lease to the owner or lessor if by so doing the owner or lessor will take possession, control and operation of the licensed premises and the business licensed under this chapter, unless the license is transferred as provided in s. 150.211; and further provided, that a licensee who is the owner of the licensed premises may not lease or otherwise give up possession, control or operation of the licensed premises and the business licensed under this chapter to any other individual, partnership or corporation, unless the license is transferred as provided in s. 150.211.

* * * *

Supreme Court, U.S.
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No. 99-356

IN THE

Supreme Court of the United States

CITY OF JACKSONVILLE,

Petitioner,

v.

LADY J. LINGERIE, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The Petitioner/Defendant is the consolidated City of Jacksonville, a municipal corporation located in Duval County, Florida.

The Respondents/Plaintiffs are the following individuals and corporations:

Lady J. Lingerie, Inc.

Jerome Bonnett

Buford B. Breland

Brian A. Cleland

Gregory A. King

Milt Howard

The 14003 Corporation, a Florida corporation

The 850 Corporation, a Florida corporation

Emro Corporation, a Florida corporation

STATEMENT PURSUANT TO RULE 29.6

There are no parent corporations or publicly held companies owning 10% or more of the stock of the corporate Respondents.

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STATEMENT OF THE CASE

The decision below properly determined that the Jacksonville zoning exception ordinance was an unlawful prior restraint under the authority of *FW/PBS v. City of Dallas*, 493 U.S. 215, 110 S. Ct. 596 (1990) and *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734 (1965). The lower courts are completely unified on this issue and there is no split among the circuits. The case of *Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634 (4th Cir. 1999) is an isolated opinion, decided on unusual facts, and does not represent a shift in the legal position of the Fourth Circuit. Neither is it in meaningful conflict with this Eleventh Circuit case. Given the established nature of the legal issues, there is no question of overriding public importance presented by this case.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THE SECOND CIRCUIT, OR ANY OTHER CIRCUIT, AS THE COURTS UNANIMOUSLY AGREE THAT ZONING EXCEPTIONS MAY CONSTITUTE A PRIOR RESTRAINT WHEN ADULT USES ARE NOT ALLOWED AS A MATTER OF RIGHT.

The City claims that there is a conflict among the Circuits concerning the proper analysis of zoning exceptions as prior restraints. The City acknowledges that the case decided below by the Eleventh Circuit is in accord with cases decided in the Fourth, Seventh and Ninth Circuits. (Petition at 14). That is, each of these courts would analyze a zoning exception or conditional use permit requirement as a prior restraint when applied against a First Amendment activity.

Respondents would add cases from the Third, Sixth, Eighth and Tenth Circuits to this list. *See Amico v. New Castle County*, 571 F. Supp. 160 (D. Del. 1983); *Dia v. City of Toledo*, 937 F. Supp. 673 (N.D. Ohio 1996); *Bukaka, Inc. v. County of Benton*, 852 F. Supp. 807 (D. Minn. 1993); *Franken Equities, L.L.C. v. City of Evanston*, 967 F. Supp. 1233 (D. Wyo. 1997).

In an attempt to demonstrate conflict between the Circuits, the City nominates two cases from the Second Circuit as its standard bearers: *Crown Street Enterprises, Inc. v. City of New Haven*, 989 F. Supp. 420 (D. Conn. 1997) and *Marty's Adult World v. Town of Enfield*, 20 F.3d 512 (2d Cir. 1994). However, a careful review of those two cases, and the history of the law in the Second Circuit, shows that there is only harmony between the Circuits. Indeed, the Second Circuit was one of the early leaders in applying the law of prior restraint to zoning situations.

In *754 Orange Ave., Inc. v. City of West Haven, Conn.*, 761 F.2d 105 (2d Cir. 1985), the Second Circuit held that a zoning ordinance targeting adult businesses was an unconstitutional prior restraint because it left unfettered discretion in the hands of decisionmakers. ("[T]he City's threat to enforce its zoning and licensing ordinances against 754 Orange operates as a prior restraint"). *Id.* at 111. This is precisely the holding in the instant case as well as *all* of the other cases which have addressed the issue. Furthermore, this decision is in accord with this Court's ruling in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S. Ct. 596 (1990).

The Second Circuit has never overturned, questioned or limited its holding in *754 Orange Ave.* Nevertheless, the City

claims that *Marty's Adult World* and *Crown Street Enterprises* (which relies on *Marty's Adult World*) have reached the opposite conclusion. However, a review of both cases shows that the City's assertion is patently incorrect.

Both of these cases applied the time, place and manner restriction adopted by this Court in *City of Renton v. Playtime, Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925 (1986) because there were sufficient sites available elsewhere where adult businesses could open as of right. The fact that a particular applicant was in a location which required a special exception did not create a prior restraint because there were alternate avenues of communication available elsewhere in the jurisdiction. Viewed another way, the sites which required a special exception were surplus locations since abundant sites were available in other zones as a matter of right.

This is not simply a matter of interpretation, but comes directly from the language of the two decisions. In *Marty's Adult World*, the Second Circuit writes:

> The special use permit requirement also is a time, place and manner regulation, since Marty's could operate elsewhere in Enfield without obtaining a special use permit.

20 F.3d at 515.

The complaint in *Crown Street Enterprises* was that a special exception was required for the particular use contemplated by the adult business. However, other adult businesses, with a slightly different format, were allowed as of right in multiple zoning districts. As in the case of *Marty's Adult World*, there were sufficient sites before one considered the special exception. Again relying on the Court's own words we learn the following:

> Similarly, in the present case, while plaintiffs may not open an adult cabaret anywhere in the city without approval, the city may not preclude the operation of plaintiff's business in zones BD, BD-1, BE, IL or IH "simply because" plaintiffs wish to offer topless dancing. Rather, the ordinance restricts dancing in those zones only in the particular context of a dining or drinking establishment.

989 F. Supp. at 423-24.

In the case at Bar, prior restraint analysis was utilized precisely because there were not enough sites available as of right. The district court found that there were only two sites in Jacksonville where an adult business of any kind could operate as a matter of right, without a zoning exception. The district court concluded that those two sites would be inadequate as a matter of law under the *Renton* standards. ("There is no question that if only two sites were available for adult use in a city the size of Jacksonville, it would be insufficient to meet the requirements of *Renton*"). *Lady J. Lingerie, Inc. v. City of Jacksonville*, 973 F. Supp. 1428, 1438 (M.D. Fla. 1997). However, the trial court erroneously counted additional sites that required governmental approval under an arbitrary ordinance which lacked procedural and substantive safeguards. *Id.* at 1438-40. The Eleventh Circuit reversed the decision because it concluded that those sites subject to the zoning exception requirement could not be counted as available for adult uses. *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1361-63 (11th Cir. 1999). Because Jacksonville did not have sufficient alternate avenues of communication (i.e. sufficient sites for adult uses), the special exception ordinance was properly considered to be a prior restraint.

When analyzed properly, it is evident that there is no conflict between the opinion below and the decisions of the Second Circuit. The Second Circuit case of *754 Orange Avenue* adopted precisely the same prior restraint analysis in a zoning context not unlike this Eleventh Circuit case. *Marty's Adult World* and *Crown Street Enterprises* do not change the law in the Second Circuit one iota. Indeed, both cases are readily harmonized with *Lady J. Lingerie* and *754 Orange Avenue*. There is no conflict between the Eleventh Circuit and any other Circuit and no reason for this Court to exercise certiorari jurisdiction in this case.

A. The City's Position That Prior Restraint Analysis Is Limited To Business Licensing Schemes Is Not Supported By Any Precedent In This Court Or Any Other Court In This Country.

The essence of the prior restraint doctrine is that government may not prohibit free speech in advance except under very precisely defined circumstances, all of which are subject to judicial review. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150, 89 S. Ct. 935, 938 (1969). The City would have the Courts abandon a functional approach to prior restraints in favor of a deterministic system governed by the name assigned to a particular form of legislation: if the ordinance is a "zoning law", it is analyzed under *Renton*; if it is a "license regulation", *FW/PBS* would control. The City would then classify all conditional use permits and zoning exceptions as "*Renton* tools" which would be subject to time, place and manner review. Petitioner prefers to ignore the fact that a conditional use permit can prohibit free speech just as effectively as a general licensing ordinance governing factors other than location.

The City is correct in relying on *Renton* for the proposition that adult businesses must be given a reasonable opportunity to open and operate. *Renton*, 475 U.S. at 54 (Petition at 17). However, nowhere in *Renton*, or in any other decision of this Court, can the City find support for the idea that zoning laws are exempt from the prohibition against unlawful prior restraints. The Eleventh Circuit correctly noted that the subject ordinance acted as a prior restraint because

> [I]t channels nearly all adult entertainment establishments through the exceptions process. That process in turn gives the zoning board discretion to delay a decision indefinitely or to covertly deny applications for content-sensitive reasons.

Lady J. Lingerie, 176 F.3d at 1363.

The Eleventh Circuit recognized that zoning ordinances are commonly upheld as constitutional time, place and manner restrictions. *Id.* at 1361. However, in this instance, the zoning ordinance was utilized in such a manner as to make it equivalent to a licensing requirement:

> [T]o operate in the CCG-2 zone, an adult entertainment establishment must apply for an exception. This makes an exception the equivalent of a license. The City does have a separate licensing procedure for adult entertainment establishments (for which, incidentally, a zoning exception is a prerequisite), but the indispensability of the zoning exception persuades us to treat it like a license as well.

Id.

This decision simply recognizes that adult businesses can be excluded from a community by arbitrarily denying special exceptions in exactly the same manner as the denial of a commercial license. This Court recognized the same danger in *FW/PBS* when it rejected claims that content-neutral licensing regulations applicable to every other business could not be treated as prior restraints. *FW/PBS v. City of Dallas*, 493 U.S. at 223, 110 S. Ct. at 603. The lower courts have all followed the same analysis when presented with zoning ordinances that require government approval before an adult site may open. As one Circuit Court said:

> Following the decision in *Renton*, the Court has made clear that otherwise valid content-neutral time, place and manner restrictions that require government permission prior to engaging in protected speech must be analyzed as prior restraints and are unconstitutional if they do not limit the discretion of the decisionmaker and provide for the Freedman procedural safeguards.

11126 Baltimore Boulevard, Inc. v. Prince George's County, Md., 58 F.3d 988, 995 (4th Cir. 1995).

Designation of an ordinance as a zoning measure as opposed to a licensing regulation has no effect on the legal analysis to be applied in a First Amendment case. This Court, and every other Court which has reviewed the issue, refuses to be fooled by mere nomenclature. *See, e.g., 3570 East Foothill Blvd., Inc. v. City of Pasadena*, 912 F. Supp. 1268 (C.D. Cal. 1996); *Santa Fe Springs Realty Corp. v. City of Westminster*, 906 F. Supp. 1341 (C.D. Cal. 1995); *TJ's South, Inc. v. Town of Lowell*, 895 F. Supp. 1124 (N.D. Indiana, 1995); *Dease v. City of Anaheim*, 826 F. Supp. 336 (C.D.

Cal. 1993); *15192 Thirteen Mile Road, City of Warren*, 593 F. Supp. 147 (E.D. Mich. 1984); *754 Orange Avenue, supra*; *Bukaka, Inc. v. County of Benton, supra*; *Franken Equities, supra*; *Dia v. City of Toledo, supra*; *Amico v. New Castle County, supra*. The City's arguments to the contrary are merely wishful thinking without any support in the law.

B. Use Of More Stringent Prior Restraint Analysis Will Have No Practical Effect On The City's Ability To Zone Or To Protect The Welfare Of Its Citizens.

The City argues that analyzing zoning laws as a prior restraint is bad policy because it deprives local government of the ability to effectively plan for development. That argument is hogwash. All a City need do is specify a sufficient number of locations or zones where adult businesses may operate as a matter of right. If there are alternate avenues of communication, *Renton* is satisfied and, presumably, citizens have sufficient access to adult communication without interference from censorship bodies sitting as local planners.

There is nothing in the *Lady J. Lingerie* decision, or the dozens of cases like it, which in any way limit government's ability to zone and plan for the benefit of its citizens. *Lady J. Lingerie* and its sister decisions function only to protect society against government attempts to censor objectionable speech. In return, society does not have to give up any of its conventional zoning tools. For instance, local governments commonly restrict adult uses to intensely commercial zones or industrial districts. *See, e.g., Z.J. Gifts D-2, L.L.C. v. City Aurora*, 136 F.3d 683 (10th Cir. 1998); *D.G. Restaurant Corporation v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991). In so doing cities engage in responsible planning by isolating alleged adverse secondary affects.

Government is also free to impose conditional use permits and other special exception schemes when regulating adult businesses, *so long as sufficient sites are available as of right*. This is the lesson to be learned from cases such as *Marty's Adult World*, *supra*. The fact that adult uses are prohibited in some zones or require a special exception in order to locate there does not take away from the fact that adult communication is readily available as a general matter. *See, generally*, *Renton*, 475 U.S. at 54.

The Court in *Lady J Lingerie* did not depart from this principle. The district court found that only two sites were available as of right in the entire consolidated City of Jacksonville. The appellate court was correct in concluding that two sites are not sufficient for a city the size and character of Jacksonville. To hold otherwise would make a mockery of the constitutional protections afforded by this Court in cases such as *Barnes v. Glen Theatre, Inc.*, 502 U.S. 560, 111 S. Ct. 2456 (1991)[1] and *Schad v. Mount Ephraim*, 452 U.S. 61, 101 S. Ct. 2176 (1981).

The City overstates the effect of the appellate decision on its ability to effectively zone both generally and with respect to adult businesses. The Eleventh Circuit made it perfectly clear that the City was free to apply its special exception standards and procedures to any zoning issues other than those governed by the First Amendment:

> To be clear, the City may still use the (c)(1) criteria (and (c)(2), for that matter) for applicants who are not entitled to First Amendment protection. We only find troublesome the

1. In *Barnes*, eight justices concluded that nude dance is entitled to at least "minimal" protection under the First Amendment.

> application of the otherwise-valid zoning criteria to adult businesses like the plaintiffs'.

Lady J. Lingerie, Inc., 176 F.3d at 1362.

Neither is the City precluded from utilizing its zoning powers to address the adverse secondary effects thought to be associated with adult businesses. The Eleventh Circuit stressed that the full panoply of zoning powers is available to the City and that proper laws can certainly be enforced against adult businesses:

> Combating the harmful secondary effects of adult businesses, such as increased crime and neighborhood blight, is a substantial government interest. *See City of Renton*, 475 U.S. at 50-52, 106 S.Ct. 925; *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 583-84, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (Souter, J., concurring in the judgment).
>
> Most zoning ordinances easily meet these standards, but this ordinance does not.

Lady J. Lingerie, Inc., 176 F.3d at 1361.

The class of businesses effected by *Lady J. Lingerie* is limited only to those with serious First Amendment implications. *Id.* at 1362. The City is free to apply its existing laws against car washes, daycare centers and shopping malls; it simply cannot enforce these standards in a First Amendment setting. Thus, the City's concerns about the additional administrative burden imposed by *Freedman* and

FW/PBS is substantially ameliorated by the simple fact that the class of potential applicants is quite small. Only ten to fifteen lingerie businesses operated in the City prior to the enactment of the ordinance. *Lady J. Lingerie*, 973 F. Supp. at 1444. Surely the City has the resources to process these few applications on an expedited basis.

Even if the City elects not to enact new zoning legislation to meet constitutional standards, it is apparent that this ruling will have almost no effect on Jacksonville's daily practices. The decision will have even less impact on businesses and local governments elsewhere in the country. The Petition for Writ of Certiorari does not raise any issue of public policy which would require the attention of this Court.

II. THE DECISION IN *STEAKHOUSE v. CITY OF RALEIGH* IS FROM AN INTERLOCUTORY APPEAL, BASED ON A UNIQUE SET OF FACTS, AND DOES NOT PRESENT A CONFLICT WITH THE DECISION BELOW.

The Fourth Circuit decision in *Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634 (4th Cir. 1999) is an isolated case decided on unusual facts and does not truly conflict with the decision below. In addition, the *Steakhouse* appellate decision is unlikely to be the final word even within that case. *Steakhouse* was determined on the basis of an interlocutory appeal from the denial of a preliminary injunction. Accordingly, both the trial court and the appellate court are free to disregard their earlier decisions if the merits of the case show that the injunction was improvidently denied. *See, University Of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S. Ct. 1830, 1834 (1981) ("[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.").

While there is no legal bar to the grant of certiorari from an interlocutory appeal, history shows that review of such appeals is rarely advisable. As this Court said in *Carson v. American Brands, Inc.*, 450 U.S. 79, 84, 101 S. Ct. 993, 996-97 (1981).

> [A]ppeal as of right under § 1292(a)(1) will be available only in circumstances where an appeal will further the statutory purpose of "permit[ting] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." *Baltimore Contractors, Inc. v. Bodinger*, supra, at 181, 75 S.Ct., at 252. Unless a litigant can show that an interlocutory order of the district court might have a "serious, perhaps irreparable, consequence," and that the order can be "effectually challenged" only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal.

The findings of fact in *Steakhouse* are not even binding on the Fourth Circuit. Nevertheless, the City relies on those facts to argue conflict with *Lady J. Lingerie*. The City focuses on the list of factors which the Raleigh Board of Adjustment utilized in evaluating special exception applications. The City argues that those factors are substantially similar to those considered under the Jacksonville zoning ordinance. However, that leap of faith is not warranted by a comparison of the cases.

The Court in *Steakhouse* merely lists the factors to be considered by the Board of Adjustment. *Steakhouse*, 166 F.3d at 639-40. The ordinance itself is not attached to the opinion

nor is it quoted at any length. There may well have been a definitional section or companion ordinance in *Steakhouse* which expanded on the simple list of factors found in the opinion. In contrast, the entire Jacksonville Ordinance is set forth in the case below and the Eleventh Circuit is justified in concluding that:

> None of the nine criteria is precise and objective. All of them — individually and collectively — empower the zoning board to covertly discriminate against adult entertainment establishments under the guise of general "compatibility" or "environmental" considerations.

Lady J. Lingerie, 176 F.3d at 1362.

Given the interlocutory posture of the *Steakhouse* appeal, and the sketchy information provided by the Fourth Circuit, one simply cannot tell whether the Jacksonville ordinance is similar to the Raleigh ordinance. It would be equally reasonable to conclude that different Courts reached different determinations on the basis of different facts. It is unlikely that *Steakhouse* and *Lady J. Lingerie* will have any great impact beyond the particular facts and the particular litigants.

When the *Steakhouse* case is examined in more detail, it is clear that one unique fact made a substantial impression on the appellate court. The Fourth Circuit was obviously concerned with the disparity between the appellant's legal position and the manner in which it conducted itself below. The appellant complained that the ordinance was defective because it did not provide for prompt review of permitting decisions. Ordinarily, this would prove the death knell for a

permitting ordinance under *FW/PBS*. In this case, however, the applicant went out of its way to delay the proceedings and made it known repeatedly that it was in no hurry to reach a conclusion to the administrative process. The appellate court put it this way:

> . . . Steakhouse's casual pursuit of its permit gives its cries of irreparable injury a tinny pitch. Steakhouse delayed the permitting process on two separate occasions. First, Steakhouse . . . requested that the BOA delay its review until January 13, 1997. Second, on February 3, 1997, Steakhouse's counsel heard the BOA's Sessions Reporter, Donna Hester, dictating the record from the January 13 meeting — a prerequisite to any judicial appeal of the BOA's permit decision. Rather than requesting an expedited effort, or even ensuring that the process was proceeding along its normal schedule, counsel told Hester "there was no rush" and instructed her to take her time. It seems curious to hear Steakhouse now complain about the loss of its asserted rights for "even [a] minimal period[ ] of time." Elrod, 427 U.S. at 373, 96 S.Ct. 2673 (plurality opinion).

Steakhouse, 166 F.3d at 637-638. Clearly the *Steakhouse* decision reflects disdain for the behavior of the individual litigant far more than it indicates any intention to establish new law contrary to that of other circuits.

The intensely factual nature of the inquiry in *Steakhouse* is also reflected in the legal analysis of the appellate court — or rather the lack of that analysis. It is interesting to note that *Steakhouse* does not attempt to distinguish any of the

score of cases which have declared zoning exceptions to be unconstitutional prior restraints. *See, e.g., 3570 East Foothill Blvd., supra*; *754 Orange Avenue, supra*; *Bukaka, Inc. v. County of Benton, supra*; *Franken Equities, supra*; *Dia v. City of Toledo, supra*. None of these cases is even cited in the opinion. The Court also made no real attempt to distinguish *11126 Baltimore Boulevard*, a recent Fourth Circuit case which struck a similar special exception ordinance as a prior restraint against adult speech. 58 F.3d at 992-993.[2]

Instead, the Fourth Circuit expressed its reluctance to allow a preliminary injunction because of the risk that the Plaintiff would obtain a vested right under North Carolina law, irrespective of what the Court ultimately ruled on the merits. *Steakhouse*, 166 F.3d at 638. Far from being a call for rebellion against those Circuits which have agreed with *Lady J. Lingerie*, the *Steakhouse* case should be viewed as an aberration arising from a unique set of facts. Surely *Steakhouse* presents little reason for this Court to take up an issue which has long been settled both by precedent both in this Court and in numerous lower court decisions across the land.

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2. Interestingly, the Petitioner includes the Fourth Circuit among those jurisdictions which are agreement with the *Lady J. Lingerie* analysis of prior restraints in a zoning context. (Petition at 14 n.9). Thus, in Point I of its Petition, the City argues that there is no conflict between the Fourth and Eleventh Circuits, while Point II argues just the opposite with respect to the Fourth Circuit's decision in *Steakhouse*. *Compare*, Petition at 14 and 22-27.

CONCLUSION

The Eleventh Circuit properly determined that the Jacksonville zoning exception ordinance was an unconstitutional prior restraint as applied against adult businesses because discretionary governmental approval was required before such businesses could open in nearly every location in the City. This opinion does not conflict with decisions of the Second Circuit or any other Circuit. Neither does the decision below conflict with *Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634 (4th Cir. 1999). *Steakhouse* was an interlocutory appeal from a unique set of facts which has little application within the Fourth Circuit much less to the nation as a whole.

There are no public policy concerns which would warrant the attention of this Court. The City is free to apply its existing zoning code to any business which does not involve First Amendment concerns and is equally free to zone adult businesses into appropriate zones as of right. As the Eleventh Circuit noted below, "[m]ost zoning ordinances easily meet these standards, but this ordinance does not." *Lady J. Lingerie*, 176 F.3d at 1361. The fact that Jacksonville was incapable of passing a constitutional zoning ordinance in this particular instance has no impact beyond the immediate litigants.

Respectfully submitted,

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REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The questions presented for this Court's review concern two distinct issues. First, the City seeks this Court's guidance in delineating the proper analytical framework to be employed when examining the constitutionality of local zoning regulations that regulate the permissible locations of adult entertainment businesses. Second, the City requests that this Court confirm the right of local planning officials to exercise more than a mere ministerial role when deciding whether a proposed land use involving protected speech is appropriate for a particular location, particularly where the speech at issue is entitled to only "marginal" protection.

Curiously, Respondents maintain that "[t]he lower courts are completely unified on this issue" (*i.e.*, which analysis to employ) and that this case does not present any questions of overriding public importance, "[g]iven the established nature of the legal issues." (Resp. Br. at 1). This position stands in stark contrast to that taken by Respondents before the Eleventh Circuit, where they stated:

> . . . This case presents a novel situation relative to the availability of sites for adult uses. . . . Although many cases have addressed the issue of *Freedman* standards as applied to adult uses and several cases have considered site availability where the sites can be utilized as of right, few or no cases have involved a situation which combines these issues.
>
> This Court has the opportunity to develop new law on this subject.

(Resp. Initial Br., Case No. 98-2207, 11th Cir., July 17, 1998).

As Respondents correctly argued in their initial position before the Eleventh Circuit, this case does, in fact, present an opportunity to develop new law on this subject. Namely,

the present state of the law is such that the lower courts are employing inconsistent analyses in examining the constitutionality of zoning provisions which regulate the permissible locations for adult entertainment businesses. This confusion has resulted in an irreconcilable conflict among the circuits, thereby necessitating the instant plea to this Court for authoritative guidance on the proper standard of review.

I. RESPONDENTS ERRONEOUSLY CONSTRUE THE CITY'S ARGUMENTS AS CALLING FOR AN ABOLITION OF THE PRIOR RESTRAINT ANALYSIS FOR ZONING REGULATIONS.

Contrary to the assertion of Respondents, the City does not maintain that "zoning laws are exempt from the prohibition against unlawful prior restraints." (Resp. Br. at 6). The questions presented for this Court's review do not entail an examination of *whether* the doctrine of prior restraint applies; rather, the questions presented seek guidance as to *which* prior restraint analysis governs the review of a local government's zoning scheme. If, as Respondents maintain, *FW/PBS* controls, then the courts must employ a two-pronged analysis to determine whether a zoning regulation constitutes an impermissible prior restraint. *See FW/PBS v. City of Dallas*, 493 U.S. 215 (1990). If, however, this Court agrees with the City that *Renton* controls, the prior restraint analysis is limited to a determination of whether the zoning criteria accord unbridled discretion to the decisionmakers. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

Under *FW/PBS*, a business licensing scheme must safeguard against both the potential for unbridled discretion and the opportunity for indefinite delay in the decisionmaking process. Under *Renton*, however, a content-neutral zoning scheme need not contain both of these safeguards. All that is

necessary under *Renton* is that the zoning regulations allow for a reasonable opportunity to communicate one's constitutionally protected message in alternative locations. By definition, a "reasonable" opportunity is one which does not entail the exercise of unbridled discretion in deciding whether a particular site is appropriate for the operation of an adult entertainment business.

This distinction is critical. If the zoning ordinance is examined as a time, place and manner regulatory scheme under *Renton*, it need not provide the full range of procedural safeguards required by *FW/PBS* for business licensing schemes. *See Marty's Adult World v. Town of Enfield*, 20 F.3d 512 (2d Cir. 1994) (citing *Freedman v. Maryland*, 380 U.S. 51 (1965)); *see also Charette v. Town of Oyster Bay*, 159 F.3d 749 (2d Cir. 1998); *Crown Street Enterprises, Inc. v. City of New Haven*, 989 F. Supp. 420 (D. Conn. 1997). This in no way eliminates the necessity of a prior restraint analysis; rather, it simply confines the courts' review to a determination of whether the zoning exception criteria accord unbridled discretion to the decisionmakers.

A. Respondents erroneously assert that the Second Circuit only employs the *Renton* analysis to examine the constitutionality of zoning regulations that require an exception solely for "surplus" sites.

Respondents dispute the City's contention that a conflict exists in the respective analyses employed by the Eleventh and Second Circuits for examining zoning ordinances that regulate the permissible locations for operating adult entertainment businesses. Although Respondents acknowledge that the Second Circuit has consistently applied the time, place and manner analysis of *Renton* to examine the constitutionality of zoning ordinances which regulate the permissible locations of adult entertainment businesses, they attempt to distinguish these cases as involving zoning schemes that required a special exception for sites that were

essentially "surplus" locations. (Resp. Br. at 3). According to Respondents, the courts employed the *Renton* time, place and manner analysis because "abundant" sites were available in other zoning districts which allowed for the operation of adult entertainment businesses as a matter of right.

Contrary to Respondents' representations, no such language is found in either *Marty's Adult World* or *Crown Street Enterprises*. Rather, the courts in both cases simply noted that adult entertainment businesses were allowed in at least one zoning district as a matter of right.[1] The cases are silent as to the precise number of sites that where actually available in those zoning districts. This is completely consistent with the City's position in the instant case; namely, that there is a dispositive distinction between business licensing schemes and zoning regulations in that the former determines *whether* the business may be conducted, regardless of its proposed location, while the latter simply prescribes *where* such activities are permissible. As aptly stated by the Second Circuit:

> The special use permit requirement that Marty's challenges is a content-neutral time, place and manner regulation, not a licensing scheme. . . . The special use permit requirement . . . is a time, place and manner regulation, since Marty's could operate elsewhere in Enfield without obtaining a special use permit. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46 (1986) (where a zoning ordinance does not ban an activity altogether, it should be analyzed as a time, place and manner regulation); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 75-76 (1981).

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1. Likewise, in the City of Jacksonville — just as in the City of New Haven and the Town of Enfield — adult entertainment businesses may operate as of right in at least one zoning district.

Marty's Adult World v. Town of Enfield, 20 F.3d 512, 515 (2d Cir. 1994).

In short, the Second Circuit never held that there were either "sufficient" or "abundant" sites available in other zoning districts where adult entertainment businesses could operate as a matter of right. No such pronouncement was necessary because the precise number of available sites is irrelevant for purposes of determining whether the *Renton* time, place and manner analysis applies. The precise number of available sites only becomes relevant *after* determining that the *Renton* analysis applies; that is, when analyzing whether the zoning scheme allows for reasonable alternative avenues of communication. *See Renton*, 475 U.S. at 932 ("In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city. . . .").

B. Respondents' characterization of the City's policy concerns as "hogwash" expressly conflicts with the high respect accorded by this Court to the interests of local governments in employing land use regulations to preserve the quality of urban life.

This Court has long-recognized that a "city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (Powell, J. concurring). Such attempts include utilizing "innovative land-use regulation, implicating First Amendment concerns only incidentally and to a limited extent." *Id.* at 73. Respondents, however, would relegate this interest in effective planning to mere "hogwash." (Resp. Br. at 8).

According to Respondents, "[t]here is nothing in the *Lady J. Lingerie* decision, or the dozens of cases like it, which in any way limit government's ability to zone and plan for

the benefit of its citizens." (Resp. Br. at 8). This assertion, however, is somewhat perplexing in light of Respondents' contention that "[a]ll a City need do is specify a sufficient number of locations or zones where adult businesses may operate as a matter of right." (Resp. Br. at 8). In other words, the decision below does much more than merely limit the ability of local governments to zone; it actually dictates *how* they are to zone. This Court has expressly rejected the notion that the First Amendment compels such a result:

> . . . Cities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton. "It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas. . . ." *Renton*, 475 U.S. at 931 (quoting *American Mini Theatres*, 427 U.S. at 71).

The First Amendment simply does not preempt the discretion of local governments to decide the most appropriate location for a particular land use. Although concentrating the adverse secondary effects of adult entertainment businesses in a single "red light" zoning district may very well be appropriate for some locales, the First Amendment does not dictate such a result. The First Amendment functions as a shield against unlawful restraints of constitutionally protected expression; it was never intended to be wielded as a sword to dictate local planning decisions.

II. RESPONDENTS' CHARACTERIZATION OF THE *STEAKHOUSE* DECISION AS AN "ISOLATED CASE DECIDED ON UNUSUAL FACTS" FAILS TO ACCOUNT FOR THE FOURTH CIRCUIT'S PRIOR PRONOUNCEMENT ON THE ALLOWABLE DEGREE OF DISCRETION IN LOCAL PLANNING DECISIONS.

In *Steakhouse, Inc. v. City of Raleigh*, the Fourth Circuit Court of Appeals expressly acknowledged that the doctrine of prior restraint does not preclude local zoning boards from exercising a limited degree of discretion to "address the well-known variables inherent in any development . . ." 166 F.3d 634, 639 (4th Cir. 1999). Zoning exception criteria which channel the discretion of planning officials do not run afoul of the First Amendment, as such criteria force local zoning boards "to focus on concrete topics that generate palpable effects on the surrounding neighborhood." *Id.*

Respondents maintain that the *Steakhouse* decision is an isolated case decided on unusual facts and, moreover, that it does not truly conflict with the decision below. (Resp. Br. at 11). Both the history of the Fourth Circuit and the express language of the opinion below reveal otherwise.

The Fourth Circuit first recognized the fundamental differences between ministerial officers and planning officials some ten years prior to announcing its decision in *Steakhouse. 11126 Baltimore Blvd. v. Prince George's County*, 886 F.2d 1415 (4th Cir. 1989) ("*Baltimore Boulevard I*").[2] In *Baltimore Boulevard I*, the Fourth Circuit was called upon to review the trial court's decision that the county's

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2. This Court initially granted certiorari to review *Baltimore Boulevard*, but subsequently vacated the judgment of the Fourth Circuit and remanded the case for reconsideration in light of this Court's decision in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

special exception criteria were unconstitutionally "vague and subject to possible manipulation and arbitrary application" by local officials. On appeal, the Fourth Circuit reversed. In so doing, the court expressly acknowledged that the First Amendment does, in fact, allow for more than mere ministerial discretion in local planning decisions:

> It is settled that any license or special exception requirement for a speech-related activity must contain narrow and definite standards to guide the authority granting approval. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). We are persuaded by the language of the challenged ordinances, the evidence in the record, and Maryland case law that the special exception requirements adopted by Prince George's County do not confer unbridled discretion upon County Council and zoning administrators. The provisions under attack provide definite guidelines, consistent with the substantial and legitimate interests advanced by the County, which zoning officials must apply when determining whether to grant a conditional use or special exception permit. The special exception application may not be denied if the applicant meets the specified ordinance requirements by substantial evidence and there is no substantial evidence to the contrary. Thus, County officials are without boundless discretion in approving or rejecting special exception applications.

Id. at 1427.

The Eleventh Circuit, in contrast, relegates local planning decisions to a mere ministerial function. *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1362 (11th Cir. 1999) ("[V]irtually any amount of discretion beyond the merely ministerial is suspect."). This conclusion is in express

conflict with the decisions of the Fourth Circuit Court of Appeals. *See Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634 (4th Cir. 1999); *11126 Baltimore Blvd. v. Prince George's County*, 886 F.2d 1415 (4th Cir. 1989).

CONCLUSION

Contrary to Respondents' contentions, the questions presented by the decision below are precisely the types of issues that warrant this Court's certiorari review. Equating content-neutral zoning regulations with business licensing schemes is inconsistent with Supreme Court precedent, decisions of the Second Circuit and sound public policy. Moreover, denying local planning authorities the ability to exercise limited discretion in evaluating the appropriateness of a proposed land use does not comport either with the decisions of the Fourth Circuit or the fundamental purpose of the prior restraint doctrine to shield against the exercise of *unbridled* discretion.

This is a land use case, with merely incidental First Amendment implications involving a form of expression that is entitled to only "marginal" protection. Zoning decisions, unlike those of censorship boards and ministerial licensing officials, necessarily demand some degree of discretion. The object of zoning is not to suppress speech, but rather to preserve the quality of urban life by protecting against the potential adverse secondary effects of any given land use. In short, zoning decisions do not warrant the heightened procedural safeguards reserved for censorship and licensing decisions. The City respectfully requests that this Court reaffirm the high respect which it has historically accorded to what has been described as "the most essential function performed by local government"[3] — zoning.

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3. *Young v. American Mini-Theaters, Inc.*, 427 U.S. 50, 71 (1976) (Powell, J., concurring).

Respectfully submitted,

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